8300 Greensboro Dr.
Suite 1200
McLean, VA 22102

(703) 584-8666
www.fcclaw.com

LNGS LUKAS, NACE, GUTIERREZ & SACHS, LLP

REDACTED – FOR PUBLIC INSPECTION

December 23, 2014

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A306
Washington, D.C. 20554

Re: Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent To Assign or Transfer Control of Licenses and Authorizations

MB Docket No. 14-57

Dear Secretary Dortch:

The American Cable Association ("ACA") hereby submits the fully redacted, public version of its Reply Comments, including one (1) Exhibit appended to the Reply Comments. The {{ }} symbols in the Reply Comments and Exhibit denote where Highly Confidential Information has been redacted, and the [[ ]] symbols denote where Confidential Information has been redacted.

A Highly Confidential version of the Reply Comments and Exhibit have been filed with the Office of the Secretary under separate cover. The Highly Confidential version of this filing will be made available for inspection pursuant to the terms of the Second Amended Modified Joint Protective Order in this proceeding.[1]

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[1] *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, Second Amended Modified Joint Protective Order, DA 14-1639 (Media Bur., rel. Nov. 12, 2014).

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Please contact the undersigned if any questions arise concerning this submission.

Sincerely,

David A. LaFuria
Brooks E. Harlow

Attorneys for
American Cable Association

Enclosures

REDACTED FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	
	)	
Comcast Corp.,	)	
Time Warner Cable, Inc.	)	MB Docket No. 14-57
Charter Communications, Inc., and	)	
SpinCo	)	
	)	
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

American Cable Association

REPLY COMMENTS

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center, Suite 212
Pittsburgh, PA 15220
(412) 922-8300

Ross Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
Cinnamon Mueller
1875 Eye Street, NW
Washington, DC 20006
(202) 872-6811

David A. LaFuria
Brooks E. Harlow
Lukas Nace Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, VA 22102
(703) 584-8678

Attorneys for the American Cable Association

December 23, 2014

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EXECUTIVE SUMMARY

In its initial comments, ACA demonstrated that the proposed transaction involving Comcast Corporation ("Comcast"), Time Warner Cable ("TWC") and Charter Communications ("Charter") if consummated, would have significant deleterious vertical and horizontal competitive effects and therefore cannot be approved absent enforceable remedial conditions sufficient to protect competition and consumer welfare. In this Reply, ACA first addresses and rebuts arguments raised by Applicants and their economists in their opposition to petitions to deny and response to comments ("Opposition") relying on a new report from its economic expert, Professor Gary Biglaiser. Next, ACA discusses the remedial conditions the Commission has traditionally employed to remedy harms associated with the combination of video programming distribution and programming assets and identifies the flaws in their enforcement mechanisms that have limited their utility. Finally, ACA sets forth proposed conditions that the Commission would need to adopt to ameliorate the harms that will result from the proposed transaction, including enabling small and medium-sized multichannel video programming distributors ("MVPDs") to enforce any rights provided in the remedies either directly or through use of a bargaining agent.

Competitive Harms

ACA's analysis of vertical harms relied on sound economic principles and use of the bargaining model relied on several times previously by the Commission. In analyzing the post-merger marketplace, ACA demonstrate that this transaction will increase the incentive and ability of Comcast-affiliated programmers and broadcasters and Charter-affiliated programmers to command higher fees for their programming assets, harms that will injure all MVPDs that purchase this programming and their customers, including those of Comcast and Charter.

ACA's analysis also demonstrated that the proposed transaction would create two varieties of horizontal harms. The first derives from key programming assets now separately owned by Comcast and TWC becoming solely owned Comcast post-transaction. With the ability to negotiate jointly its owned and operated NBC broadcast stations with TWC's regional sports networks in the New York and Los Angeles markets, Comcast will be able to extract higher programming fees from rival MVPDs. The second horizontal harm arises from the increased bargaining power that Comcast and Charter will attain over the programming industry by increasing their subscriber totals.

In response, lacking any credible case to the contrary, Applicants' economic experts (Professors Rosston and Topper) largely ignored the vertical harms predicted by the bargaining model and focused their analysis on a less probative foreclosure theory in an effort to bolster the Applicants' case that the transaction presents no public interest harms. Professor Biglaiser found Rosston and Topper's claims that no vertical harm exist using both the bargaining and foreclosure models to be flawed because of their reliance upon faulty and non-representative data. With regard to determining how many customers would leave an MVPD if must-have programming is permanently withheld, Rosston and Topper take measurements using two short-lived disputes. Moreover, in one case Rosston and Topper use subscriber data counts provided by a market research firm instead of actual customer counts from the impacted MVPD, and in the other case use a dispute occurring at a time when the withheld programming would not be considered "must have." As a consequence of using a faulty departure rate and other flawed inputs, Rosston and Topper underestimated the post-merger level of predicted price increases, Professor Biglaiser concludes. Moreover, Applicants also ask the Commission to rely upon an alternative "real world" analysis, but one flawed for similar reasons – a reliance on skewed and unreliable data selected to be as favorable to Applicants as possible. Similar flaws underlie the Applicants' attempts to rebut ACA's analysis that the proposed transaction will result in horizontal harms to other purchasers of video programming because of their control of multiple "must have" programming assets in the same market and the increased scale of both Comcast and Charter as video programming purchasers post-transaction.

For these reasons, the Commission should dismiss Applicants' blithe claims that the transaction will result in *no* public interest harms.

Previous Remedial Conditions and Their Flaws

The Commission has relied on a combination of a condition requiring non-discriminatory access and a commercial arbitration remedy to address harmful effects of prior transactions combining multichannel video distribution and programming assets. These remedial conditions have provided vital protections to MVPDs, and must again be imposed by the Commission in this case. However, the particular enforcement mechanisms the Commission has used have failings that have limited their effectiveness for MVPDs. This is particularly true for small and medium-sized MVPDs, leaving them without effective means of redress for the demonstrable harms of these transactions.

<u>The Non-discriminatory Access Condition</u>. The Commission has relied on a non-discriminatory access condition in transactions creating vertically integrated programmers or broadcasters to ensure these entities make their services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions. The application of this condition to certain classes of programmers and broadcasters not otherwise subject to non-discriminatory regulation demonstrates the Commission's belief in the unique value of imposing this obligation in combination with the commercial arbitration remedy. Despite Comcast's willingness to subject itself to the non-discriminatory access condition, the Commission inexplicably failed to include this obligation in its most recent order involving Comcast's acquisition of NBC Universal.

<u>Flaws in the Non-discrimination Access Condition's Enforcement Procedures</u>. To enforce the non-discriminatory access condition, the Commission has relied upon its program access complaint rules. Unfortunately, these procedures have two significant flaws limiting their utility for MVPDs, particularly small and medium-sized MVPDs.

The Commission's requirement that a discrimination complaint must compare the deal offered the complainant to that offered a "competing" MVPD, when combined with the permissible "volume discount" defense, severely limits any protection for small and medium-sized MVPDs from unjustified discrimination in rates, terms and conditions. This is particularly true when a small MVPD believes that a programmer affiliated with a rival such as Comcast is unfairly discriminating against it, and the MVPD competes against only Comcast and the two DBS providers. In such cases, the MVPD's only comparison case is a significantly larger MVPD, thus making it difficult for the Commission to determine whether the higher price charged to the smaller MVPD is justified by volume discounting or includes unjustified discrimination. Other aspects of the rules also unduly restrict the competing distributors that an MVPD must use as the comparison case in a discrimination complaint. The net effect is that small and medium-sized MVPDs are unlikely to obtain relief under these enforcement procedures because of the difficultly for the Commission to distinguish legitimate grounds for price differentials from illegitimate ones.

The second problem arises from the failure of the Commission's rules to ensure that MVPDs have information available necessary to determine whether a programmer is acting in a discriminatory manner, which is a vital predicate for an MVPD to protect itself effectively. The rules do not require a programmer to respond to an MVPD's certified request for a "rate card" or other similar data and information to make such an assessment. This, combined with programming industry practices of keeping MVPDs in the dark about rates charged other MVPDs for the same programming, makes it impossible for any MVPD to assess whether it is being treated in a discriminatory manner. Although a lack of proof of discrimination does not preclude the filing of a complaint in such cases, the complainant is still required to base its complaint on a comparison with a competing distributor, but will have no information on which to make a determination which competing distributor will provide the best comparison case for success on the complaint. Even with an otherwise effective enforcement mechanism, a programmer's ability to keep critical information necessary to determine whether it is acting in a discriminatory manner out of the hands of MVPDs frees the programmer to act on its incentive to discriminate without fear of being caught.

<u>Commercial Arbitration Remedy</u>. In addition to the non-discriminatory access condition, the Commission has invariably included a commercial arbitration remedy in recognition of the fact that non-discriminatory access would be insufficient to protect against the full extent of vertical harms. This is because the non-discriminatory access condition alone cannot effectively prevent a vertically integrated programmer from harming its rivals by employing a uniform price increase strategy where it avoids overt discrimination by uniformly charging all MVPDs rates above fair market value, including the vertically-integrated distributor itself. The commercial arbitration remedy used by the Commission was created to limit the incentive and ability of the vertically integrated programmer to implement this strategy and charge MVPDs rates above fair market value post-transaction.

Flaws in the Commercial Arbitration Procedures. Flaws in the design of the Commission's commercial arbitration process have rendered this remedy ineffective for small and medium-sized MVPDs. First, at the time arbitration is commenced, small and medium-sized MVPD do not have any sense whether the vertically integrated programmer is offering rates that are above fair-market value. Second, MVPDs do not have sufficient information concerning the programmer's pricing, and significantly less than the information available to the programmer, to formulate an informed final offer at the start of the arbitration process. The lack of critical information that undermines the utility of the program access complaint procedures for small and medium-sized MVPDs has the same effect on the usefulness of the arbitration remedy. With no access to key information, a small MVPD cannot accurately assess whether it is being charged fair market value or not. Moreover, unable to formulate an informed final offer, these MVPDs believe their chances of prevailing in the arbitration are low. At the same time, they are further discouraged knowing that Comcast has significantly more access to the information that is relevant to an arbitrator's determination of which final offer received is closest to fair market value. For these reasons, the baseball-style commercial arbitration remedy the Commission has employed has never lived up to its expectations as an effective antidote to the incentive and ability of vertically integrated programmers to charge rates above fair market value, particularly for small and medium-sized MVPDs.

In view of the fact that this transaction increases existing harms of the Comcast-NBCU merger, the Comcast-TWC-Charter combination calls for conditions that are more effective than the Comcast-NBCU conditions. Moreover, because the current transaction also creates new harms, it is not enough for the Commission simply to strengthen the existing Comcast-NBCU arbitration conditions; it must adopt new conditions to address these new harms. The following outlines a series of improvement to previously imposed conditions and new conditions that must be adopted before approving the Comcast-TWC-Charter transaction.

Remedial Conditions That Will Offer Meaningful Protections Against Vertical Harms

Non-Discriminatory Access Condition. The Commission must not only impose a non-discriminatory access condition to prohibit Comcast- and Charter-affiliated programmers from engaging in discriminatory practices with respect to all classes of programming, regardless of means of distribution, it also must ensure that procedures for enforcing this condition are effective for small and medium-sized MVPDs. To address the shortcomings ACA has identified, the Commission must include in its remedial conditions the following added protections and features:

- An aggrieved MVPD seeking to enforce the non-discriminatory access condition must have the right to bring a complaint comparing itself to an MVPD that is similarly situated regardless of whether the MVPD is the complainant's direct competitor or serves in the same geographic area.

- Comcast- and Charter-affiliated programmers must provide requesting MVPDs evidence that the rates, terms, and conditions offered are non-discriminatory compared to those charged similarly situated distributors.

- The Commission must give MVPDs the opportunity to audit Comcast- and Charter-affiliated programmers on an annual basis to ensure against discrimination, including post-agreement discrimination.

- The Commission should clarify that a bargaining agent designated by an eligible MVPD shall have the protections and rights under the non-discriminatory access condition just as it has protections and rights under the commercial arbitration remedy.

- The Commission should clarify that Comcast- and Charter-affiliated programmers cannot withdraw any programming from an MVPD during the pendency of a non-discriminatory access complaint.

Commercial Arbitration Remedy. Not only must an MVPD have protections against a Comcast- or Charter-affiliated programmer acting on its incentive and ability to impose discriminatory prices, terms and conditions for its programming, but an MVPD must have protections against the programmers extracting prices, terms and conditions above fair market value through a uniform price increases strategy. The Commission must adopt a set of targeted reforms to its baseball-style arbitration remedy to render it effective, particularly for small and medium-sized MVPDs.

- Upon request of an MVPD, a Comcast- or Charter-affiliated programmer must provide data and information that permits an MVPD to determine whether the offered rate is equivalent to fair market value and to formulate an informed "final offer" in an arbitration.

- The baseball-style arbitration process should be modified to require the Comcast- and Charter-affiliated programmers to submit the first final offer which may then be reviewed by the MVPD before submitting its own final offer.

Conditions to Address Horizontal Harms

ACA has demonstrated that the Comcast-TWC-Charter transaction will greatly expand the bargaining leverage that Comcast and Charter have as MVPD purchasers programming from third parties. This will result in Comcast and Charter paying lower prices per-subscriber for video programming based on increases in the number of subscribers each will serve. Consistent with industry practices, programmers will seek to make up the losses by raising prices charged to small and medium-sized MVPDs. The Commission should impose two conditions to ameliorate this harm.

- Comcast should be prohibited from negotiating programming agreements on behalf of Bright House Networks, Midcontinent Communications, or any other MVPD.

- Comcast- and Charter-affiliated programmers should be prohibited from interfering with a third-party programmer's ability to provide any prices, terms, or conditions to an MVPD.

Remedial Conditions to Address Harms in the Cable Advertising Market

ACA has demonstrated how the pending transaction increases Comcast's control over a majority of Interconnects in the United States and the National Cable Communications ("NCC") This control over the regional and national cable advertising market gives Comcast the ability to demand anti-competitive terms of MVPDs seeking to participate in them, including forgoing the right to choose to sell spot advertising on their own or through a preferred independent spot advertisement representative. Comcast has failed to rebut effectively this showing that the transaction will have anti-competitive effects, and commits to nothing going forward to address these issues.

To address the anti-competitive impacts of the proposed transaction, the Commission must adopt the following remedial conditions:

- Comcast shall be prohibited from taking any action that serves to exclude any MVPD from participating in any regional Interconnect or the NCC based on the MVPD's election to sell its spot cable advertising inventory on its own or through any spot cable advertising representation firm of its choosing.

- Comcast shall be prohibited from taking any action that serves to prevent a regional Interconnect or the NCC from doing business with any MVPD at fair market value and on non-discriminatory rates, terms, or conditions based on the MVPD's election to sell its spot cable advertising inventory on its own or through any spot cable advertising representation firm of its choosing.

Duration of Conditions

This transaction can be approved only if remediated in the manner ACA recommends. It is vital that if such conditions are imposed, they are long-lasting because the harms resulting from this transaction are unlikely to dissipate over time. Any conditions imposed must remain in effect for at least nine years following the closing of the transaction. After nine years, Comcast and Charter should be required to return to the Commission and apply for relief, making the case at the time that conditions have changed sufficiently to warrant relief from one of more of the conditions, rather than allow the conditions to expire by their terms.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of	)	
	)	
Comcast Corp.,	)	MB Docket No. 14-57
Time Warner Cable Inc.,	)	
Charter Communications, Inc.	)	
and SpinCo	)	
	)	
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	

REPLY COMMENTS

The American Cable Association ("ACA") replies to the Opposition to Petitions to Deny and Response to Comments ("Opposition") filed in this docket on September 23, 2014, by Comcast Corporation ("Comcast") and Time Warner Cable Inc. ("TWC") (collectively, "the Applicants"). ACA explained in its initial comments that the proposed transaction will vastly augment the size and reach of Comcast, the largest cable operator in the nation through its absorption of TWC, the second largest operator, and significantly increase the size of Charter Communications, Inc. ("Charter"), the nation's fourth largest operator. It will also combine TWC's programming with Comcast's extensive suite of programming assets, adversely affecting a majority of the multichannel video programming distributor ("MVPD") subscribers served by other distributors who compete against Comcast as well as harm Comcast's own customers, contrary to the public interest. By increasing both Comcast's and Charter's total number of subscribers served, it will also increase their bargaining leverage with programmers and result in these companies lowering their overall programming costs, further increasing the disparity in wholesale programming rates paid by these very large cable operators and their smaller rivals. Nothing presented by the Applicants in their response rebuts or even weakens the strength of ACA's data and analysis. The fact remains that this transaction will cause vertical and horizontal harms in the video programming distribution market and cannot be approved without remediation through the imposition of substantial, effective and long-lasting license conditions.

I. THE TRANSACTION WILL CAUSE VERTICAL HARMS, PARTICULARLY TO SMALL AND MEDIUM-SIZED MVPDS

A. ACA Has Demonstrated the Transaction Will Cause Several Vertical Harms.

It its opening comments, ACA and its expert economist, Dr. Gary Biglaiser, demonstrated that vertical harms will arise from the proposed transaction.[1] As the Commission has found, the combination of Comcast distribution assets and NBCU programming assets gives Comcast an incentive and the ability to charge other MVPDs higher prices for its programming.[2] Charter's affiliated programmers have a similar same incentive and ability. This vertical harm will grow larger as a result of the instant transaction because the merger increases the opportunity cost to Comcast- and Charter-affiliated programmers of selling their programming to

[1] *See* ACA Comments, MB Docket No. 14-57 (Aug. 25, 2014) ("ACA Comments") and attached Exhibit A, Gary Biglaiser, *The Harms of Comcast-TWC-Transaction* ("Biglaiser I").

[2] *E.g., Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees,* MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4253-55, ¶ 35 (2011) ("*Comcast-NBCU Order*").

MVPDs in two ways. As Dr. Biglaiser discussed, the merger will increase Comcast's and Charter's *opportunity* to attract more subscribers from existing and new rival MVPDs due to its increased number of homes passed and, second, it will increase Comcast's and Charter's *incentive* to attract subscribers from existing and new rival MVPDs due to its increased profitability per video subscriber due to its greater margins resulting from the merger.[3] In turn, the higher opportunity cost for selling its programming gives Comcast- and Charter-affiliated programmers a greater incentive and ability to raise the price of its programming to MVPDs who compete against their affiliated MVPD.[4] As Comcast acknowledges and recognizes, competing MVPDs will pass on any increase in programming cost to their subscribers.[5] Offsetting benefits to this vertical harm are nonexistent or de minimis.[6]

Analyzing the existing and increased vertical harms from the proposed transaction, Dr. Biglaiser demonstrated that the overlap of Comcast's and Charter's MVPD footprint will increase with other MVPDs and buying groups with regard to Comcast's nation cable programming assets and NBC O&O broadcast stations:[7]

[3] *E.g.*, Biglaiser I at 5, 28.

[4] Biglaiser I at 5, 28.

[5] *E.g.*, Opposition at 163-64; *see also* Biglaiser I at 7, 11.

[6] *See* Biglaiser I at 24.

[7] Including BHN. Data was not available to calculate the increased overlap with AT&T. Biglaiser I at 19.

Change in Competitive Overlap with Comcast Resulting from Transaction with Respect to Comcast's National Cable Programming Assets[8]

MVPDs Other than Comcast, BHN, and Midcont.	Subs	Pre-Merger Competitive Overlap with Comcast	Post-Merger Competitive Overlap with Comcast	Difference	Competitive Overlap with BHN	Total Difference
DirecTV	20.2M	35%	50%	15%	3%	18%
DISH Network ("DISH")	14.1M	35%	50%	15%	3%	18%
NCTC	9.0M	20%	22%	2%	4%	6%
Verizon	5.4M	41%	67%	26%	7%	33%
AT&T	5.9M	N/A[9]	N/A	N/A	N/A	N/A
Other MVPDs	14.0M	0	0	0	0	0

Included in the MVPDs that will be impacted are more than 900 small and medium-sized MVPDs that rely upon the National Cable Television Cooperative (NCTC) to negotiate deals in the aggregate for them. With respect to Comcast specifically, Dr. Biglaiser calculates that among MVPDs serving 54.6 million subscribers, 49.2 million of them—representing 90% of all

[8] The same conclusions about Comcast's opportunity cost increasing if this transaction is approved may be reached with regard to Charter's opportunity cost with respect to its attributable programming, such as Discovery and Starz. If approved, Charter's homes passed increases from 12.2 million to 13.7, and when SpinCo's 5.6 million homes passed are included, Charter's total homes passed totals 19.3 million. With regard to the DBS providers this is an increase of 1.1% for Charter, and 5.2% when the change for Charter is added to the change for SpinCo. With regard to ACA members who regularly participate in NCTC negotiated programming transactions, the Charter swaps with Comcast results in these MVPDs' competitive overlap with Charter increasing by 4.36%. Including SpinCo, the combined overlap is an increase of 9.16%. ACA's data for Verizon's competitive overlap with Charter shows it decreasing by 3.5%. ACA does not have reliable data for AT&T. Given these results, consumers will likely be harmed as a result of the increased homes passed by Charter and SpinCo and its competitive impact on MVPDs, who serve a majority of customers whose MVPDs are affected by the vertical harm.

[9] Due to a lack of publicly available data and information about the video footprint of AT&T, ACA is unable to determine the company's pre-merger and post-merger footprint with Comcast and its affiliates.

subscribers served by operators who compete some with Comcast and are potentially affected by the merger—will experience harm from the transaction.[10]

Instead of offering reasonable conditions to address these well-recognized harms, the Opposition attempts to deny their existence by rejecting or ignoring recent Commission findings and overwhelming evidence. Given clear and demonstrated harm, based on well-recognized economic principles and the Commission's own framework for analysis, improved conditions must be implemented.

B. Comcast's Opposition to the Vertical Harms Relied on Faulty Data and Analyses.

The Opposition all but ignores the vertical harms detailed by ACA, particularly as to small and medium-sized MVPDs, by relying on a blanket denial.[11] Comcast addresses ACA's evidence and analysis of vertical harms solely in the Rosston and Topper economic report included as an appendix to the Opposition. But, as Biglaiser II demonstrates, Rosston and Topper's report cannot be credited because it relies upon faulty economic models, faulty analysis, and on faulty, non-representative, and unreliable data.[12]

Rosston and Topper attempt to demonstrate that the proposed transaction will not result in any competitive harm primarily based on a foreclosure model.[13] In response to Dr. Biglaiser's

[10] Biglaiser I at 19.

[11] Out of the 324 pages of Opposition comments, slightly less than a page directly addressed ACA's analysis showing that the proposed transaction increases the risk of vertical harm based on the increased incentives for Comcast to raise prices for programming to competing MVPDs.

[12] *See generally* Gary Biglaiser, *The Harms of Comcast-TWC Transaction II*, attached to these Reply Comments as Exhibit ("Biglaiser II") at 9-15.

[13] *See* Opposition at Exhibit 2, Gregory L. Rosston and Michael D. Topper "An Economic Analysis of the Proposed Comcast Transactions with TWC and Charter in Response to Comments and Petitions" (Sept. 20, 2014) ("Rosston and Topper").

demonstration that the Commission's established bargaining model measuring the vertical harm of this transaction is the better model and proves competitive harm will occur, Drs. Rosston and Topper claim that the bargaining model is not a "realistic" representation.[14]

In the foreclosure model, Rosston and Topper calculated minimum departure rates that purportedly would make it profitable for Comcast to permanently foreclose one of its rival MVPDs. They found that engaging in a foreclosure strategy against its rival MVPDs would not be beneficial to Comcast.[15] However, notwithstanding flaws with the inputs used in their foreclosure model, the model itself is not the best way to determine whether the merger will have anticompetitive effects, because if there are gains to trade between Comcast or Charter and a rival MVPD, then the programming price that a Comcast- or Charter-affiliated programmer charges to the rival would be adjusted just enough so that Comcast or Charter can maximize its benefits without foreclosing the rival MVPD. This will lead to higher costs for the rival MVPD and most, if not all, these cost increases will be passed onto its subscribers. The Commission recognized this in the Comcast-NBCU transaction, and thus it analyzed that transaction using the bargaining model.

Flaws in Rosston and Topper's analysis, particularly their use of faulty data in concluding that the bargaining model does not show any vertical harm, are discussed below. Next, ACA briefly examines how the same faulty data was employed in purportedly showing that the less relevant foreclosure model demonstrates no vertical harm. Finally, we show why the "real

[14] *See* Rosston and Topper at ¶¶ 74-78.

[15] That is the costs of permanent foreclosure (e.g. lost advertising and programming fees) would exceed the benefit that some subscribers will switch to Comcast. *See* Rosston and Topper at ¶¶ 110, *et seq.*

world" analysis conducted by Rosston and Topper is a flawed analysis and should be given little or no weight.

1. Comcast relies on faulty and non-representative analysis and data in attempting to rebut ACA's vertical harms analysis.

The conclusions reached in the Opposition regarding the lack of evidence of vertical harm are based on Rosston and Topper's work, which attempts to diminish the existence of harm by suggesting the use of different data from different sources than the Commission has relied on in the past for its bargaining model. But, as Dr. Biglaiser demonstrates in his reply analysis, Rosston and Topper used questionable methodologies and data sources to derive their version of two parameters of the bargaining model, the departure rates and profit level. Irrespective of the appropriate values of the inputs, Rosston and Topper fail to refute Dr. Biglaiser's overarching conclusion that the transaction increases the existing vertical harms that the Commission found to exist in Comcast/NBCU.

The biggest flaws that Dr. Biglaiser identified in Rosston and Topper's work are in the data and assumptions they used to produce departure rates in the bargaining model, which led them to incorrectly conclude that Comcast-affiliated programmers' post-merger incentive to raise rates would be insignificant.[16] Rosston and Topper claim that the Fisher-DISH dispute data that the Commission relied upon in the *Comcast-NBCU Order* to determine departure rates is dated, so they turned to two more recent–but less reliable–data sets: the Media General-DISH dispute (stations in 17 television markets withdrawn for 46 days) and the CBS-TWC dispute (stations in six television markets withdrawn for 32 days).[17]

[16] *See generally* Biglaiser II at 9-15.

[17] Biglaiser II at 10.

Significantly, both the Media General-DISH and the CBS-TWC disputes were relatively short-lived. Media General-DISH lasted one-quarter of the length of time as the Fisher-DISH dispute and the Comcast-TWC dispute lasted one-sixth of the time.[18] Neither time period is sufficient to observe whether subscribers will depart from an MVPD based on loss of programming.[19]

Another significant shortcoming of Rosston and Topper's calculation of a departure rate is their use of flawed subscriber count data to determine the number of subscribers that actually left DISH when access to the "must have" programming was lost during the negotiation impasse. Rosston and Topper's data on the Media General-DISH dispute is not sourced from DISH's internal subscriber data. Accordingly, Rosston and Topper did not have accurate data on the number of subscribers that the MVPD had on the first and last day of the dispute in the markets affected by the blackout or in their control groups. Instead, they used estimated quarterly subscriber data reported on a market-by-market basis by SNL Kagan, a market research firm.

There are significant problems with using Kagan's market estimates to determine the departure rate as Rosston and Topper did. To appreciate the problems, one must understand how Kagan derives its quarterly subscriber data on a market-by-market basis for cable and satellite TV providers. Kagan's market-by-market cable subscriber data is based on semi-annual filings by cable operators and only show subscriber counts at the end of the second and fourth quarters

[18] Biglaiser II at 13.

[19] Biglaiser II at 13.

of each year. Therefore, market-by-market counts at the end of the first and third quarter are not actual data, but merely estimates based on interpolation using a smoothing calculation.[20]

Kagan's satellite TV provider data is even less precise than its cable data, particularly on a market-by-market basis. As Dr. Biglaiser explains in detail, unlike cable, satellite TV providers are not required to semi-annually report their subscriber totals on a market-by-market basis, but rather they report subscribers nationally. Therefore, Kagan has no source for actual market-by-market subscriber counts for each satellite TV operator. Kagan's quarterly "market-by-market" data for each satellite provider's subscriber counts is based on an initial estimated market-by-market allocation by Kagan, and then each market is adjusted quarter-by-quarter in significant part on changes in its quarterly "market-by-market" data for cable providers, which as discussed above are only based on actual numbers in the second and fourth quarters. Although Kagan might have some insight into the number of cable subscribers gained or lost in a market, Kagan has limited insight into what percentage of those cable subscribers came or left from DISH or DirecTV. Worse yet, Kagan's methodology for estimating its quarterly market-by-market reporting for cable or satellite does not even consider the impact of a programming blackout.[21]

For these reasons, Dr. Biglaiser concludes that Kagan's quarterly "market-by-market" data for DISH is extremely unreliable, particularly so for deriving the number of subscribers that DISH had at the start of their dispute (end of the third quarter) and at the end of their dispute

[20] Biglaiser II at 11.

[21] Biglaiser II at 11.

(middle of the third and fourth quarter).[22] Accordingly, the data developed by Rosston and Topper based on the withdrawal of programming for DISH in specific markets is of little, if any, value in developing an appropriate departure rate.

Compounding their errors in choosing insufficiently long disputes in both cases and using unreliable SNL Kagan subscriber data, Rosston and Topper's choice of the CBS-TWC dispute to calculate departure rates suffers from the fact that it occurred in a non-representative time period. The CBS-TWC dispute occurred mostly in August, a period of particularly low viewership of broadcast stations due to the predominance of summer re-runs and the lack of regular season NFL games, which are the highest rated programming.[23] In other words, although a network affiliated broadcast station is "must have" for an MVPD, the month of August is one where the need to carry it is the least pressing. As a consequence of their reliance on non-representative, non-probative data, they predicted a faulty departure rate and underestimated the level of the prices increase due to the merger.

Dr. Biglaiser also casts significant doubt on the second input that Rosston and Topper used, which is their calculation of Comcast video profits. Rosston and Topper chose Comcast profit levels that are much smaller than those estimated by respected analysts.[24] Moreover, the profits they used vary hugely—and inexplicably—from one region to another, despite programming prices being very similar for Comcast across regions.[25] Because one cannot

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[22] Biglaiser II at 11-12.

[23] Biglaiser II at 11.

[24] Biglaiser II at 12.

[25] Biglaiser II at 12-13.

determine with certainty how the profits per subscriber were computed for the different regions, Dr. Biglaiser questions the validity of the Rosston and Topper calculations.[26]

In sum, the two events that Rosston and Topper used to calculate departure rates provide no reliable evidence that the actual departure rate will be as low as they predict, and the claimed per video subscriber profit levels are insufficiently supported. Their use of these inappropriate events and unreliable data undermine their conclusion that the bargaining model shows Comcast- and Charter-affiliated programmers' post-merger incentive to raise rates would be insignificant.

Given the weaknesses in Rosston and Topper's case against the demonstration of harm utilizing the Commission's bargaining model, it is understandable that Applicants barely mention it in their Opposition. In absence of alternative reliable data, the Commission should continue to rely upon its prior findings and conclusions for departure rates for "must have" programming, and for per video subscriber profit levels. That is, the Commission should continue to rely on the Fisher/DISH dispute to calculate departure rates and profit levels accepted by the Commission in the *Comcast/NBCU Order*. Whatever inputs the Commission chooses to accept, the Commission found in the *Comcast/NBCU Order* that Comcast would have an incentive and ability to harm rival MVPDs using its bargaining model, and Rosston and Topper do not persuasively refute Dr. Biglaiser's finding that the proposed transaction will increase the vertical harm that currently exists.

[26] Biglaiser II at 12-13.

2. Applicants mischaracterize ACA's vertical harms analysis and their assertion that the foreclosure model demonstrates no harm relies on faulty and non-representative analysis and data.

To the limited extent the Opposition addresses the increased vertical harms, it deflects attention from the increased risk of programming price increases by using a "foreclosure" argument.[27] Again, Rosston and Topper use some of the same faulty data inputs for the foreclosure model as they did for the bargaining model to support their conclusions that a foreclosure strategy would not benefit the Applicants. Regardless, the whole argument is a misdirection from the real issue.

ACA has never asserted that any of its members have been foreclosed from obtaining Comcast's programming since the NBCU merger, or that Comcast would seek such a strategy. Rather, the issue is the price Comcast charges, and will charge post-transaction.[28] The Commission has found that a vertically integrated Comcast would have an economic incentive to raise programming prices to rival MVPDs, more so than an independent NBCU.[29] Using the Commission's own findings and economic methods, ACA's Comments demonstrated that the proposed transaction increases the risk—by increasing the economic incentives—that Comcast has to raise prices to MVPDs.[30]

Putting aside the Opposition's extensive arguments on the foreclosure straw man, there is very little in response to the real issue, Comcast's incentive and ability to raise rivals' prices,

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[27] *See* Opposition at 239-42, 243-49.

[28] *See* ACA Comments at 15-20.

[29] *E.g., Comcast-NBCU Order,* 26 FCC Rcd at 4253-55, ¶¶ 35-38.

[30] ACA Comments at 19-20; Biglaiser I at 20-21.

which Applicants acknowledge are supported by economic theory.[31] Unable to answer the sound economic theory supporting vertical harms, that the Commission adopted just four years ago, Applicants turn instead to a two-pronged "real-world" approach,[32] relying on Rosston and Topper's analysis.[33]

3. The claim that a "real-world" analysis demonstrates no harm relies on faulty and non-representative data and analyses.

The Opposition attempts to undercut the bargaining model's conclusions by denying any existing vertical harms actually exist, implying in the comments that there have been no programming price increases, or no unusual price increases, since Comcast's vertical integration with NBCU. Rosston and Topper attempt to support these conclusions based on two types of so-called "real-world" analyses of markets.

First, for the cable networks acquired in the Comcast/NBCU transaction, the Opposition cites a regression analysis that shows prices for these networks increased, but supposedly not greater than the "control" networks.[34] Rosston and Topper posit that, once Comcast acquired the networks, one would have expected that there would be greater price increases for the owned programming than the control networks.[35] Second, for Comcast owned and operated ("O&O") television stations, another set of programming assets acquired through the Comcast/NBCU

[31] *See* Opposition at 243 ("in theory a vertically integrated MVPD might be able to cause programming prices to increase").

[32] Although Comcast argues elsewhere that its opponents lack a sound economic theory, when it suits itself, Comcast turns away from sound economics to support a supposed "real world" analysis of price changes. *Compare, e.g.,* Opposition at 150 *with* Rosston and Topper at ¶ 176.

[33] *Compare, e.g.,* Opposition at 150 *with* Rosston and Topper at ¶ 176.

[34] *See* Opposition at 242-43.

[35] *See* Rosston and Topper at ¶¶ 112-126.

merger, the Opposition again relies on Rosston and Topper's analysis showing the price increases purportedly were "in line" with non-Comcast O&O station fees.[36] Then, despite the fact Rosston and Topper's analysis shows price increases for both types of programming, the Opposition concludes that, "data from the last several years show that that [programming price increases have] not happened for a vertically integrated Comcast."[37]

The analytical underpinning of these two "real-world" approaches is merely that while Comcast's prices have increased, they have not increased as much as other supposedly comparable networks. The implication that prices have not increased more in absolute terms is false, or at least grossly misleading. Moreover, the assertion that prices have not increased in relative terms is based on faulty "real-world" regression analysis.

The principal flaw is the "control" group that Rosston and Topper used for comparison. The real-world control networks Rosston and Topper selected—for example, ESPN, ESPN2, and the NFL network—were weighted toward sports programming that is much more popular than the supposedly comparative Comcast/NBCU networks.[38] Indeed, nine of the sample "control" networks they selected—half of them—are more popular than the second most popular NBCU network.[39] This highlights an inherent shortcoming of some real-world analyses - it is impossible to control for all the variables. Apart from not using comparable networks for their "real-world" analysis, Applicants made no attempt to address whether Comcast ended up

[36] *See* Opposition at 243.

[37] *See* Opposition at 243.

[38] Biglaiser II at 13.

[39] Biglaiser II at 13.

charging entities that it competes with higher prices than it charged entities that it doesn't compete with.

In the second prong of their "real-world" response to programming price increases, for O&O stations, Rosston and Topper switch gears and do not employ a regression analysis.[40] The response boils down to a claim that NBC O&O prices are still lower than the other stations, and therefore despite substantial and rapid price increases there has been no vertical harm. But the Rosston and Topper analysis uses unreliable data, and a methodology that masks the fact that Comcast's NBC O&Os prices have increased both on an absolute and on a percentage basis ***faster*** after the Comcast-NBCU merger than the others.

The actual programming price numbers, conveniently omitted from the Opposition comments, tell the real story. Since 2010, the NBC O&Os increased in price at a faster rate than the other big four national network-affiliated O&O stations.[41] The prices in 2010 for NBC O&Os in 2010 were [[[redacted]]] and are now [[[redacted]]]. The prices for Fox O&O, CBS O&O, and ABC O&O in 2010 were [[[redacted]]], [[[redacted]]], and [[[redacted]]], respectively and are now [[[redacted]]], [[[redacted]]], and [[[redacted]]].[42]

Dr. Biglaiser details additional flaws in the data upon which Rosston and Topper rely. The data they selected failed to exclude the rate Comcast pays for NBC O&Os, which doesn't represent a true arm's length negotiation, yet they include the amount Comcast pays for Fox

[40] Biglaiser II at 13-14.

[41] Biglaiser II at 17.

[42] Biglaiser II at 17.

O&Os, CBS O&Os, and ABC O&Os.[43] These failures, and others, further undercut the Rosston and Topper comparisons.[44]

Even assuming there were no price increases—which is counterfactual—data from 2011-2013 may not be a long enough period of time to see the full impact of the vertical integration. The three years sampled come on the heels of, and on the verge of, two major merger transactions subject to close regulatory scrutiny. Moreover, the sample many not fully account for existing carriage agreements that were not renewed during this period. At the outset, Rosston and Topper make no effort to demonstrate that three years is enough time for the risks of vertical integration to result in projected price increases even under normal circumstances. But in the context of Comcast's major acquisitions of NBCU and TWC, the period of 2011 to 2013 is not normal. Once this transaction is approved, the underlying economics will still be there, but the short term moderations could disappear, absent more effective conditions. Accordingly, if the Commission were to look at the "real-world," then it should also consider that Comcast's programming price increases may have been deliberately muted in the short term, to achieve overarching regulatory goals.

Lacking a solid factual foundation for its argument, Comcast is left with no answer to ACA's economic analysis and has been forced to rely on a purported "real-world" analysis using skewed and unreliable data sets. ACA has demonstrated that the vertical integration harms will increase if the Commission approves the transaction without more effective conditions than currently exist. The Commission should reject the unreliable data sets provided by Rosston and

[43] Biglaiser II at 18.

[44] *See generally* Biglaiser II at 11-15 (use of less accurate SNL Kagan "industry estimates" data and use of markets that do not have all affiliates for all four networks).

Topper for all the reasons provided by Dr. Biglaiser, and should continue to rely upon its prior findings and conclusions for departure rates for "must have" programming assets, which the Commission has justifiably relied upon in the past.

In sum, Comcast's flawed "real-world" analysis of the demonstrable vertical harms flowing from this transaction should be largely disregarded. The harms ACA has identified exist and will increase, and the Applicants have not met their burden of proof to demonstrate that the harms are overcome by benefits, or will be ameliorated by additional conditions.

II. APPLICANTS HAVE DONE NOTHING TO REBUT THE FACT THAT THE PROPOSED TRANSACTION RISKS HORIZONTAL HARMS, PARTICULARLY TO SMALL AND MEDIUM-SIZED MVPDS

In contrast to the vertical harms, which are barely mentioned, Applicants expend considerable effort attempting to dispel the risks of horizontal harms. Since Comcast and TWC largely do not compete horizontally as MVPDs, they apparently view horizontal harms as minimal or non-existent. But, as ACA demonstrated in its opening comments, the transaction creates two sources of horizontal harm.

First, the addition of TWC's RSNs in Los Angeles and New York City to the programming offered by Comcast will allow Comcast to raise prices to other MVPDs for the programming in those two large markets. Second, the increased bargaining power that Comcast will have with programmers due to increasing its subscriber size from 21 to over 31.4 million video subscribers (assuming it negotiates programming agreements on behalf of Midcontinent Communications and Bright House Networks) will enable Comcast to obtain lower prices for programming, which will likely cause programmers to increase the prices charged to small and medium-sized MVPDs. Charter's bargaining power over programmers will increase as well. By acquiring new cable systems and negotiating on behalf of SpinCo, the company will grow from 4.2 million to up to 8 million subscribers, and will be able to command better rates, terms, and conditions. The Applicants have not met their burden to demonstrate that the significant horizontal harms from this Transaction do not overcome the supposed benefits, nor have they offered any conditions to offset the harms so that the transaction would be in the overall public interest.

Applicants miss the point regarding the harm of Comcast acquiring TWC's RSNs in Los Angeles and New York City to its existing programming holdings in those two markets. Drs. Rosston and Topper argue that Comcast will not be able to raise prices in Los Angeles and New York because TWC's sports programming is not a close substitute for the general entertainment programming on Comcast's O&O stations. But Dr. Biglaiser's analysis did not rely on the networks being close substitutes, but on "the fact that the value of additional networks has diminishing value to an MVPD."[45]

Dr. Biglaiser reiterates this in Biglaiser II, noting that:

> The bargaining power effect of joint ownership of two "must have" programming assets does *not* depend on the networks being close substitutes. It simply relies on the MVPD having a downward sloping demand function, which is not an unreasonable assumption and is one the Commission has accepted in recent proceedings.[46]

The Commission has already found this to be true in the *Comcast-NBCU Order*. The two networks need only be "partial substitutes from the perspective of MVPDs" for the merged entity

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[45] *See* Biglaiser I at 23.

[46] *See* Biglaiser II at 22-23 (emphasis in original) (footnotes omitted).

to be able "to obtain a higher price for the two programming assets . . . ."[47] Thus, Rosston and Topper's claim that in order for prices to increase, the networks need to be substitutes, runs counter to prior Commission findings. And, just this year, the Commission found that even when stations are only partial substitutes, evidence shows that prices increase with joint negotiation.[48]

In an attempt to partially negate the horizontal harm ACA identifies, Applicants assert that Comcast will not acquire majority ownership of any New York City RSNs, only a minority interest, and that currently rights to the RSNs and O&Os are not negotiated together. Neither point eliminates the concern or risk of higher programming prices. Comcast will increase its financial stake in the NYC RSN because it will acquire TWC's stake. Full control is not a requirement to have an incentive and ability to charge higher prices to rivals – even a significant minority interest creates a meaningful incentive. And just because the RSNs and O&Os are not currently negotiated together does not mean that they won't be negotiated together in the future. Indeed, because it has been established that joint negotiations drives aggregate prices higher than separate negotiations, the incentive will be for Comcast to move to joint negotiations after the merger.[49]

Additionally, Applicants fail to treat seriously the substantial risk that an over 50% increase in the number of subscribers that Comcast owns or negotiates on behalf of – from 21 to

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[47] *Comcast-NBCU Order*, 26 FCC Rcd at 4398-99, Appendix B, Technical Appendix, Section I.C., Horizontal Price Increases.

[48] *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3358-59, ¶ 13 (2014) ("joint negotiation gives [top] stations both the incentive and the ability to impose on MVPDs higher fees … than they otherwise could impose" even though they are only "partial substitutes for one another….").

[49] *See, e.g.*, Biglaiser II at 23; *Comcast-NBCU Order*, 26 FCC Rcd at 4398-99, ¶ 54.

31.4 million – presents to programming prices of other MVPDs, particularly the smallest ones.[50] In the programming market, MVPDs with more subscribers are generally able to secure the lower programming rates than MVPDs with fewer subscribers.[51] It is reasonable to expect that Comcast's and Charter's substantial increase in its size will enable it to successfully negotiate even lower prices from programmers. Applicants dismiss this concern based on the superficial view that lower prices are always good, and therefore fail to come to grips with the serious harm to competition that is likely to occur.[52] Further, they dismiss out of hand both the empirical evidence of industry experts and the supporting economic theory that Comcast's programming price decreases will push up prices for other buyers of programming.[53]

Contrary to Applicants' cavalier dismissal, ACA's and other's concerns are grounded not only in economics, but in the facts and the law.[54] It is well-recognized that a powerful buyer can raise the prices for or limit access of its rivals to essential inputs.[55] As ACA detailed in its Comments, it is well-recognized among small and medium-sized MVPDs that programmers seek to make up price concessions they are forced to offer to larger MVPDs, such as Comcast or Charter, by raising the prices to small or medium-sized MVPDs.[56]

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[50] The Applicants also dismiss the impact of Charter's increased size.

[51] Biglaiser II at 23.

[52] *E.g.*, Opposition at 163 ("[I]t is hard to see the public interest harm . . . from the claim that Comcast might achieve lower programming prices").

[53] Opposition at 164 ("[T]here is no reason or basis in economics….").

[54] *See* Petition to Deny of DISH Network Corporation, MB Docket No. 14-57 (Aug. 25, 2014), at 83-86, http://bit.ly/1sRZoJ3.

[55] *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (agreement setting uniform price for the purchase of sugar beets had "the necessary and inevitable effect . . . to reduce competition in the interstate distribution of sugar"); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 928 (7th Cir. 2000) (large toy buyer used its power to exclude rivals' access to popular toys).

[56] *E.g.*, ACA Comments at 26-27 and Exhibit B, Declaration of Rich Fickle ("Fickle Declaration"), ¶¶ 8-9.

Applicants' claim that this empirically observed fact has "no basis in economics," ignores a substantial body of legal and economic work on the phenomenon, which is known as the "waterbed" effect.[57] The waterbed effect and its harm are described as "the possibility that … better supply terms for powerful buyers can lead to a worsening of the terms of supply for smaller or otherwise-less-powerful buyers, which might then have an adverse consequence for consumers if downstream competition is lessened."[58] Once it takes hold, it can be a vicious cycle, with the powerful buyer getting increasingly better terms and taking more market share from the smaller rivals, who pay ever higher prices.[59] Competition can then be harmed if the small rivals exit the market,[60] reducing overall output, or the powerful buyer raises prices after a market shakeout, leading to higher retail prices in the long run.[61]

One legal scholar, John Kirkwood provided an extensive and detailed analysis of how mergers that enhance buying power can be anticompetitive.[62] As he noted and documented with extensive evidence and citations, "such [buyer] power has been used in the past to reduce competition."[63] Professor Kirkwood identifies ten situations in which a merger that creates "countervailing power" would ultimately reduce competition and harm consumers, suppliers, or

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[57] *See* Dobson & Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WISC. L. REV. 331 (2008) ("Dobson & Inderst"). With a waterbed, and some markets, when you push down on one place, it pushes another place up.

[58] Dobson & Inderst at 333.

[59] Dobson & Inderst at 347-48.

[60] Some evidence of this is already appearing in the MVPD market, as smaller cable operators are beginning to exit video in response to higher programming costs and declining margins. *See, e.g.*, "More Cable Companies Take TV Off Menu" Wall Street Journal (subscription) at http://on.wsj.com/1BYhhhw (Sept. 30, 2014).

[61] *See* Dobson & Inderst at 351.

[62] Kirkwood, J., *Powerful Buyers and Merger Enforcement*, 92 B.U. L. REV. 1485 (2012) ("Kirkwood").

[63] Kirkwood at 1491.

society. Five of the harms he identifies are to the upstream market, and five are to the downstream market.

The anticompetitive impacts of Comcast's and Charter's increased buyer power that are of greatest concern to the ACA are those to the downstream markets. Professor Kirkwood succinctly summarizes the five downstream harms as follows:

> A large buyer may use the countervailing power it acquires through the acquisition of a rival to harm competition in the downstream sale of its products or services, diminishing the welfare of consumers. In particular: (1) the merged firm may coerce or induce its suppliers to raise the costs of its remaining rivals, enabling the merged firm to increase prices in downstream markets; (2) the merged firm may extract price cuts or other concessions from its suppliers and they may react by increasing prices to other buyers, allowing the merged firm to raise its own prices; (3) the merged firm may obtain discriminatory concessions that are so large and long-lasting that they enable the merged firm to drive out or greatly diminish the market share of smaller buyers, increasing downstream concentration and making tacit or explicit collusion more likely; (4) even if downstream prices fall as the merged firm takes share from its smaller rivals, their destruction may deprive consumers of choices they preferred and depress overall consumer welfare; and (5) the concessions obtained by the merged firm may allow it to become less efficient, less dynamic, and less responsive to changing consumer preferences.[64]

The Opposition's blithe assertion, that there can be no harm in Comcast or Charter becoming a more powerful buyer because of reductions to Comcast's and Charter's programming prices, is a short-sighted response that fails to recognize the longer term economic implications for the markets. It is Comcast's arguments, not ACA's, which run counter to economic theory. In a merger review involving a substantial increase of the buying power of an

[64] Kirkwood at 1537 (footnote citing Dobson & Inderst, on the "waterbed effect" omitted).

already powerful buyer, it is critically important to address the risks of the waterbed effect and other potential adverse impacts from Comcast and Charter acquiring undue buyer power.

ACA has put evidence in the record that the waterbed effect is already occurring in the cable programming market.[65] As Comcast's post-merger buying power increases substantially, the waterbed effect is likely to only get worse. As Dr. Biglaiser notes, Inderst and Valletti further demonstrate in a Hotelling style model that if the difference in wholesale prices (programming prices) is already sufficiently large, then, *by making the large firm even larger, aggregate consumer welfare can be lower due to the waterbed effect.*[66]

Applicants cannot (and do not) deny that Comcast pays the lowest programming prices of any MVPD, while its smaller rivals pay substantially higher prices for a product that has the same marginal cost regardless of the size of the buyer. This is evidence of market power, since price differences would reflect cost differences much more closely in a competitive market.

Ironically, Applicants' answer to evidence of Comcast's obvious market power is a tacit admission that it exists:

> There may well be differences between smaller MVPDs and MVPDs the size of TWC, DirecTV, or Comcast, but major price differentials appear to be flattening out with the industry moving to more standard pricing. And this makes sense. In today's highly competitive MVPD market, where switching is increasingly easy, <u>it would not be advisable for a programmer to create too much differential between one MVPD's prices and another's</u> in the same market, since that could drive subscribers to switch to the MVPD with lower wholesale pricing (and result in less revenue for the programmer), all else being equal.[67]

[65] Fickle Declaration, ¶¶ 8-9.

[66] Biglaiser II at 27.

[67] Opposition at 158 (emphasis added) (footnote omitted).

While acknowledging the price differences, Applicants offer no support for their bald assertion that they "appear to be flattening out."[68] Of course, Comcast itself is also a programmer. Accordingly, if it were true that the prices for programming are close to and trending toward a flattening rate, regardless of the size of MVPD, then Comcast and Charter should have no objection to a merger condition requiring all Comcast- and Charter-affiliated programmers to offer their programming to all MVPDs at the same rates, terms, and conditions or at least to significantly limit the differential between the largest and smallest.

Finally, Comcast claims that the transaction will not increase its bargaining power or leverage, it merely "raises the stakes for both sides."[69] This is easy for Comcast to say in its position as the largest (soon possibly even larger) MVPD, with superior and growing bargaining position. Yet it does not explain why the stakes would be raised equally for both sides. It is hard to comprehend that a 50% increase in a buyer's size with no change in the seller's would result raise the stakes equally.

If Comcast is implying that, after the merger, it risks having 31.4 million subscribers, up from 21 million, losing service just as the programmer risks losing a sale to 10 million more customers, that is not a meaningful comparison. Rather, both before and after the merger Comcast risks 100% of its subscribers losing the programming under negotiation. There is no relative change. In contrast, if the programmer fails to reach a deal, it risks losing not just an additional 10 million subscribers, but also an incremental percentage of its sales, since it would still have been able to negotiate a deal with TWC independently even if the Comcast

[68] *See* Opposition at 158.

[69] Opposition at 156.

negotiations failed. The stakes are raised on both sides, but not equally, which gives Comcast additional bargaining leverage to negotiate lower programming rates.

If Comcast is able lower its programming prices even a little, as Dr. Biglaiser demonstrates, then for the programmers to make up the revenue losses from the small or medium-sized MVPDs requires a much larger price increase. This is because the revenue offset is necessarily spread across the much smaller subscriber bases of the small MVPDs. To illustrate, suppose that after the merger, Comcast is negotiating on behalf of 30 million subscribers, and the NCTC is negotiating on behalf of 7 million subscribers. If Comcast can lower the rate it would pay to a single programmer as a result of its increased size by $0.05 per subscriber per month, and the programmer sought to make up the lost revenue from the NCTC, smaller cable operators who opt into the NCTC would end up paying $0.21 more per subscriber per month. Thus, even if Comcast receives a relatively small additional concession from programmers post-merger, the waterbed effect will drive programmers to seek much greater offsetting price increases from small or medium-sized MVPDs.

Having demonstrated the substantial harms that will accrue to MVPDs and consumers if the transaction is approved as proposed, we discuss below conditions that are required to mitigate these harms.

III. FLAWS IN THE REMEDIAL CONDITIONS THE COMMISSION TRADITIONALLY RELIES UPON TO ADDRESS SOME OF THE COMPETITIVE HARMS OF THE PROPOSED TRANSACTION HAVE LIMITED THEIR EFFECTIVENESS

As demonstrated above, the Comcast-TWC-Charter transaction will cause both vertical and horizontal harms to competition in the MVPD marketplace and to consumers of MVPD services. Some of these harms are substantially similar to harms that the Commission recognized in its review of previous transactions involving distribution and programming assets and attempted to address through remedial conditions.[70] Other harms are unique to this transaction.

To date, in crafting remedial conditions for transactions uniting programming and MVPD distribution assets, the Commission has largely relied on a combination of a non-discriminatory access condition and a commercial "baseball-style" arbitration remedy to lessen the ability of vertically-integrated programmers to harm rivals of its affiliated MVPDs.[71] However, as demonstrated below, neither the non-discriminatory access condition nor the baseball-style arbitration remedy have been fully effective in the past and neither will be sufficient in the future to address the problems created by the instant transaction, particularly for small and medium-sized MVPDs. In view of the fact that this transaction increases existing harms of the Comcast-NBCU merger, the Comcast-TWC-Charter combination calls for conditions that are stronger than the Comcast-NBCU conditions. Moreover, because the current transaction also creates new harms, it is not enough for the Commission simply to strengthen the existing Comcast-NBCU arbitration conditions; it must adopt new conditions to address these new harms.

[70] *General Motors Corporation and Hughes Electronics Corporation, Transferors and News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 575, ¶ 223 (2004) ("*News Corp.-Hughes Order*"); *News Corporation and the DirectTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008) ("*Liberty-News Corp.-DirectTV Order*"); *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("*Adelphia-Comcast-TWC Order*"); *Comcast-NBCU Order*.

[71] *See Comcast-NBCU Order*, 26 FCC Rcd at 4355-81, Appendix A; *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8336-39, Appendix B; *Liberty-News Corp.-DirecTV Order*, 23 FCC Rcd at 3340-49, Appendix B; *News Corp.-Hughes Order*, 19 FCC Rcd at 676-83, Appendix F.

A. The Commission Has Traditionally Relied on a Combination of a Non-Discriminatory Access Condition and a Commercial Arbitration Remedy to Address the Harmful Effects of Transactions Combining Multichannel Video Distribution and Programming Assets

In each prior MVPD merger, the Commission has relied on a combination of a non-discriminatory access condition and a commercial arbitration remedy to address competitive harms associated with the combination of MVPD distribution and programming assets. The Commission found that a nondiscriminatory access condition was needed to protect against discriminatory practices, whereas a commercial arbitration remedy was required to prevent above fair market value pricing through a uniform pricing strategy.

In *News Corp.-Hughes*, the first merger review by the Commission involving a significant combination of programming assets and MVPD distribution assets, the Commission found that the transaction would increase the incentive and ability of the combined entity to engage in anticompetitive strategies with respect to the sale of its national and regional programming networks and local broadcast stations to other MVPDs, and such strategies would allow the combined entity to charge higher fees for this programming. However, instead of rejecting the combination, the Commission believed it could sufficiently mitigate its harms through remedial conditions.

The remedial conditions adopted relied upon a combination of a non-discriminatory access condition fashioned on the existing program access rules and a commercial arbitration remedy. The Commission explained the benefits of a non-discriminatory access condition as follows:

> [T]he program access rules (and other non-discrimination safeguards) serve several useful functions with respect to the video programming subject to a vertically integrated firm's control. First, the program access

> rules prohibit permanent foreclosure with respect to all satellite cable programming. Second, they can prevent overt discrimination in the prices the integrated firm charges for such inputs.[72]

Although the Commission recognized that the program access rules, including the prohibition on discriminatory prices, terms, and conditions in the sale of programming already applied to all of News Corp.'s satellite-delivered cable programming due to Liberty Media's ownership interest in News Corp.,[73] it nonetheless imposed an additional safeguard, a non-discriminatory access condition:

> News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.[74]

For enforcement purposes, the Commission specified that aggrieved MVPDs may bring complaints against News Corp. using the same procedures as those contained in the Commission's rules governing program access complaints.[75]

Furthermore, the Commission extended the non-discriminatory access condition to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent.[76] The Commission found that its retransmission consent rules, although supplying important safeguards by requiring good faith negotiation with MVPDs and prohibiting

[72] *News Corp.-Hughes Order*, 19 FCC Rcd at 513, ¶ 84.

[73] *News Corp.-Hughes Order*, 19 FCC Rcd at 534, ¶ 132 (concluding that, as a general matter, the Commission's program access rules satisfactorily address any imbalance of power between News Corp. and competing MVPDs with respect to national and non-sports regional cable programming networks and its "acceptance of the offered conditions ensures that any imbalance that may exist between DirecTV and some of its competitors in the MVPD market is remedied in the same manner as with vertically integrated MVPDs that use cable technology to deliver their product to consumers, regardless of any post-closing changes in the corporate relationships between News Corp. and its various cable programming affiliates"), 676, Appendix F, Section II.

[74] *News Corp.-Hughes Order*, 19 FCC Rcd at 525, ¶ 113.

[75] *News Corp.-Hughes Order*, 19 FCC Rcd at 529-31, ¶¶ 124-126.

[76] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219.

exclusive retransmission consent agreements "do not prevent broadcasters from withholding their signals while negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions."[77] In adopting the non-discriminatory access condition for News Corp.'s local broadcast stations, the Commission explained "Congress prohibited non-discrimination for satellite programming to ensure this programming was available to competing MVPDs. We believe that a similar prohibition toward News Corp.'s broadcast stations will counter its market power and make certain that this critical programming is available to MVPDs."[78] The broadcast non-discrimination condition imposed states:

> The non-discrimination commitments that News Corp. has proposed and we have imposed as conditions regarding non-discriminatory access to satellite cable programming networks are extended to any broadcast station that News Corp. owns and operates or on whose behalf it negotiates retransmission consent.[79]

The Commission further found that the non-discriminatory access conditions alone would be insufficient to protect against the full extent of the vertical harms of the combination of News Corp. and DirecTV with respect to access to two classes of "must have" video programming: regional sports networks ("RSNs") and local broadcast stations.[80] With evidence that significant

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[77] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219.

[78] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219. Section 325(b)(3)(C)(ii), establishing the good faith negotiation obligation, specifically protects the right of a television broadcast station to enter into retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs "if such different terms and conditions are based on competitive marketplace considerations." The good faith negotiation rules would not, therefore, protect against News Corp. charging DirecTV an unjustifiably lower price than it charges unaffiliated MVPDs post-merger, and by imposing the program access condition for broadcast programming, the Commission recognized that additional protections would be required.

[79] *News Corp.-Hughes Order*, 19 FCC Rcd at 683, Appendix F, Section VI.

[80] This programming, according to the Commission, lacked adequate substitutes and over which the News Corp. already possessed significant market power. *News Corp.-Hughes Order,* 19 FCC Rcd at 542, 565, ¶¶ 147, 201. The Commission found that the transaction would increase News Corp.'s incentive and ability to engage in temporary foreclosure strategies to raise the price of programming to rivals. *News Corp.-Hughes Order*, 19 FCC Rcd at 546-47, ¶ 159 (RSNs), 568, ¶ 209 ("In the long term, News Corp.'s use of market power [in the negotiation

numbers of customers would shift MVPDs if such programming is withheld, which is the case with "must have" video programming, and that the per-subscriber profit generated by each DirecTV subscriber would be sufficiently large, the Commission concluded that News Corp. would have an extra incentive to adopt a strategy in order to uniformly raise the price of this programming.[81] The Commission noted the non-discrimination provisions of the program access rules "were not intended to regulate or address the level of rates *per se*"[82] that would prevent a uniform pricing strategy, and the rules governing the negotiation of retransmission consent will not prevent News Corp. from uniformly raising broadcast programming carriage costs to all MVPDs, including DirecTV."[83] To address this concern, the Commission imposed a baseball-style arbitration condition in addition to the non-discriminatory access conditions to facilitate the resolution of disputes over RSNs and local broadcast television stations and to reduce the incentive for a vertically-integrated programmer to overcharge MVPDs for its programming through a uniform pricing strategy.[84]

The Commission could have imposed only arbitration to remedy all competitive harms with respect to News Corp.'s programming while relying on the fact that News Corp.'s satellite-delivered national and regional cable programming was already subject to the program access rules. That, however, was not what was done. The Commission found the need to impose both a non-discriminatory access condition on all of News Corp.'s attributable programming and an

of retransmission consent] to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.").

[81] *News Corp.-Hughes Order*, 19 FCC Rcd at 626, ¶ 366.

[82] *News Corp.-Hughes Order*, 19 FCC Rcd at 547-48, ¶ 162.

[83] *News Corp.-Hughes Order*, 19 FCC Rcd at 569, ¶ 211.

[84] *News Corp.-Hughes Order*, 19 FCC Rcd at 551-55, ¶¶ 170-177.

additional commercial arbitration remedy on its attributable "must-have" programming. It is therefore evident, particularly with regard to local broadcast television stations that are not subject to program access rules, that the Commission found the non-discriminatory access condition to have independent value in mitigating the harms of the transaction with respect to all classes of video programming.

The Commission used the same approach of reliance on a nondiscriminatory access condition to prevent the extraction of discriminatory prices, terms, and conditions together with baseball-style arbitration to address the ability to obtain above fair market value rate levels through a uniform pricing strategy in two successive MVPD transaction reviews involving ownership of cable programming. In its 2006 *Adelphia-Comcast-TWC Order*, the Commission found that the series of purchases and system swaps between and among Comcast, TWC and Adelphia would enable Comcast and Time Warner to charge discriminatory rates against individual MVPDs by imposing temporary foreclosure strategies[85] or "by imposing uniform price increases applicable to all MVPDs."[86]

To address these harms, the Commission first imposed a non-discriminatory access prohibition on Comcast, TWC and their covered RSNs, regardless of the means of delivery, similar to the non-discriminatory access condition imposed on News Corp-DirecTV.

> Comcast, Time Warner, and their existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an

[85] *See Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8258, ¶ 121 ("[B]y temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier.").

[86] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 568, ¶ 123 ("We find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called "stealth discrimination," or by permanently or temporarily withholding programming).

> exclusive basis to any MVPD, and Comcast, Time Warner, and their Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[87]

For enforcement purposes, aggrieved MVPDs were again permitted to bring complaints against Comcast and TWC or their covered RSNs alleging a violation of the non-discriminatory access condition using the procedures set forth in the Commission's program access rules.[88]

Because the Commission found "the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases," the *Adelphia-Comcast-TWC Order* imposed an arbitration remedy similar to that imposed in *News Corp.-Hughes* to maintain the pre-integration balance of bargaining power between the vertically integrated cable programming networks and rival MVPDs.[89]

Once again, although the Commission could have sought to mitigate the vertical harms of the Adelphia-Comcast-TWC transaction through commercial arbitration alone, it relied instead upon the combination of a non-discriminatory access condition and a commercial arbitration remedy. As it had in the *News Corp.-Hughes Order*, the Commission imposed a non-discrimination condition on programming already subject to the program access rules as well as on programming not subject to the rules – in this case terrestrially-delivered RSNs, which at the time of the review were not subject to the non-discrimination provision of the program access rules.[90] The fact that the Commission imposed the non-discriminatory access condition on

[87] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8336, Appendix B, Remedies and Conditions, Section B.1.a.

[88] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8274, ¶ 156.

[89] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8274, ¶¶ 156, 160.

[90] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8274, ¶ 156 n.525.

terrestrially-delivered RSNs, makes clear that it did not believe imposing the arbitration condition alone was enough to address the competitive harms of the transaction. The non-discriminatory access condition had unique value.

In 2008, the Commission addressed the competitive harms arising from Liberty Media's acquisition of News Corp.'s interests in DirecTV with respect to RSNs and any local broadcast station owned by or on whose behalf Liberty Media negotiates retransmission consent through a combination of non-discriminatory access conditions and a commercial arbitration remedy.[91] Liberty Media and DirecTV agreed to comply with the conditions that News Corp. and DirecTV agreed to in the *News Corp.-Hughes Order*. Specifically, as a condition of approval, Liberty Media and DirecTV were required to make existing or future national and regional cable programming available to MVPDs on a non-exclusive and nondiscriminatory basis, and subject to complaints under the procedures of the program access rules:

> Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD. Liberty Media shall continue to make such services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[92]

The Commission also extended its non-discriminatory access condition to subject any broadcast station that Liberty Media owns or on whose behalf it negotiates retransmission consent to this non-discriminatory access commitment:

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[91] *Liberty-News Corp.-DirectTV Order*, 23 FCC Rcd at 3302, ¶ 79 ("[U]nfair practices must be prevented even where no damage to a competitor can be shown. In this manner, Congress and the Commission inferred the vertically integrated firm's incentive to engage in unfair practices."); *Liberty-News Corp.-DirectTV Order*, 23 FCC Rcd at 3342-49, Appendix B, Conditions, Section IV.

[92] *See Liberty-News Corp.-DirectTV Order*, 23 FCC Rcd at 3340-41, Appendix B, Conditions, Section III., ¶¶ 1, 7 (footnotes omitted).

> The non-discrimination commitments that Liberty Media has proposed and we have crafted as conditions regarding access to non-discriminatory access to satellite cable programming networks are extended to any broadcast station that Liberty Media owns or on whose behalf it negotiates retransmission consent. [93]

Lastly, the companies were required to comply with the arbitration condition for any affiliated RSNs or local broadcast television station signals.[94] By re-adopting the conditions requiring non-discriminatory access to programming owned, or on whose behalf Liberty Media negotiated carriage – particularly broadcast stations that are not otherwise subject to the non-discrimination restriction of the program access rules – the Commission again demonstrated that both forms of protections were necessary to ameliorate the competitive harms of the vertical combination.

Most recently, the Commission made an unexplained departure from this approach in fashioning conditions to mitigate public interest harms flowing from the Comcast-NBCU transaction and applied only a baseball-style arbitration condition to remedy all potential competitive harms to MVPDs arising from the combination of NBCU programming assets with Comcast's programming and distribution assets.[95] This is puzzling for two reasons. First, Comcast included a "Commitment" in its Application "to voluntarily extend the key components of the Commission's program access rules to negotiations with MVPDs for retransmission rights to the signals of NBC and Telemundo O&O stations for as long as the Commission's current

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[93] *See Liberty-News Corp.-DirectTV Order*, 23 FCC Rcd at 3345-46, Appendix B, Section IV.G.1., Conditions Concerning Access to Local Broadcasting Television Station Signals.

[94] *Liberty-News Corp.-DirectTV Order*, 23 FCC Rcd at 3305, ¶ 88.

[95] *Comcast-NBCU Order*, 26 FCC Rcd at 4259-62, ¶¶ 49-59; *see also Comcast-NBCU Order*, 26 FCC Rcd at 4364, Appendix A, Section VI, REPLACEMENT OF PRIOR CONDITIONS ("These conditions shall supersede the program access conditions and commercial arbitration remedy imposed on Comcast [in the *Adelphia-Comcast-TWC Order*]."), Section VII, COMMERCIAL ARBITRATION REMEDY.

program access rules remain in place."[96] Second, the Commission required "Comcast-NBCU to provide all MVPDs, at fair market value and non-discriminatory prices, terms and conditions, any affiliated content that Comcast makes available *online* to its own subscribers or to other MVPD subscribers,"[97] thus reflecting its understanding of the importance of a non-discriminatory access condition.

In the Comcast-NBCU review, the Commission focused primarily on harms related to price increases and recognized that post-transaction, Comcast could discriminate against rival MVPDs,[98] and engage in a uniform price increase strategy.[99] The Commission found that Comcast had this discriminatory incentive with regard to all video programming that it managed or controlled, including its bundle of national cable networks, and/or any local broadcast television station on whose behalf Comcast or NBCU negotiates retransmission consent. "As a

[96] Comcast Application and Public Interest Statement, Appendix 8, Commitment # 15. Commitment #14 similarly offered voluntary acceptance of application of the program access rules to the HD feeds of any SD feed subject to the rules prior to the Commission's determination that the rules applied in such instances. *See Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, File No. CSR-8185-P, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011); *AT&T Services, Inc. and Southern New England Telephone Co. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, File No. CSR-8196-P, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011) (withholding HD feeds of RSN programming significantly hindered competition and is subject to program access rules). Apparently, Comcast and NBCU recognized the importance of these added non-discrimination protections for unaffiliated MVPDs, even if the Commission did not.

[97] *Comcast-NBCU Order,* 26 FCC Rcd at 4240-41, ¶ 4, 4359, Appendix A, Conditions, Section IV.A.1.

[98] *Comcast-NBCU Order*, 26 FCC Rcd at 4255, ¶ 37 ("[W]e find that Comcast-NBCU will negotiate more aggressively relative to the pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.").

[99] *Comcast-NBCU Order,* 26 FCC Rcd at 4255, ¶ 38 ("Comcast-NBCU could raise the price of programming to Comcast at the same time it raises prices to Comcast's rivals.")

consequence, without conditions, the transaction would likely harm competition in every such market."[100]

Once again, the Commission concluded that protections beyond those offered against discrimination by the program access rules were required to protect unaffiliated MVPDs from the harm of uniform price increases with respect to certain classes of must-have programming.[101] However, instead of applying both the non-discriminatory access and commercial arbitration conditions to cover programming already also subject to program access and retransmission consent rules as it had done previously in reviewing transactions involving vertical integration, the Commission imposed only its baseball-style arbitration remedy.[102] While it is clear that the Commission believed that the program access non-discrimination rules would continue to apply by their terms to Comcast's covered national and regional cable programming after the merger,[103] there is no discussion regarding the failure to explicitly incorporate Comcast's voluntary commitment (#15) to "extend the key components of the Commission's program access rules to negotiations with MVPDs for retransmission rights" to NBC and Telemundo

[100] *Comcast-NBCU Order*, 26 FCC Rcd at 4257-58, ¶ 44.

[101] *Comcast-NBCU Order*, 26 FCC Rcd at 4259, ¶ 49.

[102] That is, unlike each of the prior merger orders discussed above, the Comcast-NBCU Order did not incorporate reference to the Commission's program access rules or impose additional program access non-discrimination conditions with respect to negotiation of retransmission consent with MVPDs for Comcast O&O broadcast stations. *See Comcast-NBCU Order*, 26 FCC Rcd at 4364, Appendix A, Conditions, Section VI, Replacement of Prior Conditions ("These Conditions shall supersede the program access conditions and commercial arbitration remedy imposed on Comcast in [the *Adelphia-Comcast-TWC Order*]"); *see Comcast-NBCU Order*, 26 FCC Rcd at 4364, Appendix A, Conditions, Section VII, Commercial Arbitration Remedy; *see also Comcast-NBCU Order*, 26 FCC Rcd at 4259-62, ¶¶ 49-58 (discussion of why the program access rules, which do not apply to broadcast programming, are insufficient to remedy the potential vertical harms of the merger involving uniform price increases, but no discussion why removal of the prior program access conditions was appropriate).

[103] *Comcast-NBCU Order*, 26 FCC Rcd at 4261-62, ¶ 56 (discussing how the program access rules would adequately address commenters' concerns about volume-based discounts thus obviating the need to adopt conditions regarding the issue in the order).

O&O station signals or to include a non-discriminatory access condition to protect unaffiliated MVPDs from discriminatory retransmission consent prices when the Commission found such a condition vital in all previous merger reviews.

B. Reliance on the Procedures Set Forth in the Commission's Program Access Rules to Enforce the Non-Discriminatory Access Condition Imposed in Previous Mergers Has Left MVPDs Without an Effective Means of Redress.

As discussed above, the Commission traditionally relies, in part, on a non-discriminatory access condition to protect MVPDs from the harmful effects of mergers combining MVPD distribution and programming assets. The non-discriminatory access condition the Commission has used offers vital protections for rival MVPDs and should be applied to the instant transaction as well. This condition, however, depends upon the program access complaint procedures contained in the Commission's rules to permit MVPDs to seek redress. Unfortunately, the procedures for enforcing the prohibition on discriminatory practices under the program access rules have flaws that limit their utility for MVPDs, particularly small and medium-sized MVPDs. To the extent the Commission relies on a non-discriminatory access condition enforced through its program access complaint process to protect MVPDs from the harms of this transaction, it must adopt special modifications to the complaint process to facilitate its effective enforcement. Without significantly improving the functionality of the processes for enforcing the non-discriminatory access condition, they will be not protect MVPDs from the harms of the transaction as intended. This is particularly true for small and medium-sized MVPDs.

The program access rules, adopted in 1993, were intended to prevent a cable operator or a cable-affiliated programmer from (i) engaging in unfair acts or practices which hinder significantly or prohibit an MVPD from providing satellite cable programming to subscribers or consumers; (ii) discriminating in the prices, term and conditions of sale or delivery of satellite cable programming; and (iii) entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest.[104] The primary aim of the prohibition on discrimination in the prices, terms and conditions of sale of cable-affiliated programming is to limit the ability of cable-affiliated programmers to act on its incentive to charge its rivals higher license fees. Aggrieved entities may file a complaint with the Commission. Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms, and conditions for the sale of programming.[105]

The program access rules have been largely successful in preventing cable operators from entering into exclusive arrangements with affiliated cable programmers, or from refusing to deal with MVPDs for access to cable-affiliated content. Yet, the enforcement rules have never been effective in advancing claims for discriminatory treatment and the Commission has been reluctant to rule on such cases. The Commission's records contain numerous refusal to deal cases, yet an exhaustive search for rulings in price discrimination cases revealed only two.[106] Put another way, in nearly 22 years since the program access rules were enacted, the Commission has adjudicated only two cases of price discrimination and none within the past 16 years. From ACA's perspective, cases have not been brought or not been resolved because of a number of significant flaws in the procedures adopted for bringing a program access complaints. Below,

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[104] *See* 47 C.F.R §§ 76.1000 *et seq*.

[105] *See News Corp.-Hughes Order,* 19 FCC Rcd at 496, ¶ 43.

[106] *See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, CSR-4873-P, Memorandum Opinion and Order, 12 FCC Rcd 15209 (Cable Svcs. Bur. 1997); *Turner Vision, Inc., Satellite Receivers, Ltd., Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc. v. Cable News Network,* CSR-4676-P, *et al.*, Memorandum Opinion and Order, 13 FCC Rcd 12610 (Cable Svcs. Bur. 1998) ("*Turner Vision, Inc.*").

ACA highlights the main flaws in the Commission's program access complaint procedures solely for the purpose of illustrating the types of improvements that must be included in remedial conditions if the program access complaint process is to be used to effectively enforce a non-discriminatory access condition to address the harms of the instant transaction.[107]

1. The Commission's requirement that a discrimination complaint must compare the deal offered the complainant to that offered a "competing" MVPD combined with the permissible "volume discount" defense severely limits any protection for small and medium-sized MVPDs from unreasonable discrimination in rates, terms and conditions.

The program access complaint rules unduly restrict the universe of MVPDs that a complainant may use as a comparable to demonstrate discrimination. In its *1993 Program Access Order*, the Commission expressed the view that discrimination under Section 628(c) occurs when a cable-affiliated programmer sells the same or essentially the same programming to two "competing distributors" at different prices, terms, or conditions and such discrimination is not permitted under one or more of the specific factors enumerated in the statue.[108] The Commission's pleading rules accordingly require an MVPD alleging discrimination through a program access complaint to present evidence showing that the rates, terms, or conditions charged or offered by a cable-affiliated programmer to it is different than those charged or offered to a "competitive distributor."[109]

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[107] As discussed again below, ACA is not seeking amendments to the Commission's rules themselves. Rather, just as the Commission has included modifications the American Arbitration Association rules for use solely in arbitrations brought pursuant to its prior remedial conditions, it must also include in its remedial conditions here modifications to its program access complaint rules for use solely in program access complaints filed to enforce the remedial conditions.

[108] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd 3359, 3400, ¶ 95 (1993) ("*1993 Program Access Order*").

[109] *1993 Program Access Order*, 8 FCC Rcd at 3400-01, 3416-17, ¶¶ 96, 125; *see also* 47 C.F.R. § 76.1003(c)(4).

For purposes of defining a "competitive distributor," the rules require the complaining MVPD to show that its service area and that of the competing MVPD have some overlap.[110] This, however, is not the only limitation. To establish that another MVPD is a "competing distributor," the Commission also looks to see whether the complainant competes in the same geographic market as the competing distributor, which can be local, regional or national, depending on how the MVPD buys and distributes programming. Thus, locally oriented distributors, like a local cable operator, will "generally file discrimination complaints if another local distributor received a more favorable programming contract."[111] Whereas a nationally oriented distributor, like a DBS operator, would make its case against another nationally oriented distributor.

> We believe that this approach for defining the relevant geographic market for competing distributor is the most reasonable approach when analyzing discrimination complaints. Where local competition actually occurs, we should not permit a distributor alleging discrimination to draw comparisons to another distributor operating outside the bounds of that competition. Similarly, where national competition actually occurs, we should not constrain a complainant to drawing comparison to local or regional distributors.[112]

ACA notes that most favored nation ("MFN") clauses used in individual programming licensing agreements generally do not limit the set of comparable distributors based on their service territory or their geographic scope of operations. Therefore, industry participants do not appear to believe that differences between the areas served by MVPDs or the national scope of

[110] *1993 Program Access Order*, 8 FCC Rcd at 3400-01 ¶ 96.

[111] *1993 Program Access Order*, 8 FCC Rcd at 3400-01, ¶ 96.

[112] *1993 Program Access Order*, 8 FCC Rcd at 3401, ¶ 97.

operations should significantly affect the favorableness of terms and conditions received by a distributor.

Problems with the Commission's limitation on the attributes of an MVPD that may be utilized as a reasonable comparable in a program access discrimination case are exacerbated by the volume discount defense, which makes identifying unjustifiable discrimination nearly impossible for most small and medium-sized MVPDS who only compete against far larger MVPDs.

Once a small or medium-sized MVPD files a complaint alleging discrimination in comparison to the rates charged to a competing MVPD, the burden shifts to the cable-affiliated programmer to justify the price differential between what it is offered or charged the complaining MVPD and what is charged the competing distributor. The Commission considers four factors that may justify discrimination: (i) cost differences at the wholesale level among distributors; (ii) volume differences; (iii) creditworthiness and financial stability; and (iv) differences in the "offering of service."[113] Of the four, the volume differences factor, due to its vagueness, present a significant and unfair barrier to obtaining redress from unjustified discriminatory prices for small and medium-sized MVPDs.

Few would deny that volume discounts are a common feature of programming agreements. Assuming two MVPDs are equal in all other ways, an MVPD with many subscribers will pay lower per-subscriber fees for the same programming compared to an MVPD with fewer subscribers. Due to the widespread use of non-disclosure provisions in programming agreements, data demonstrating that significant volume discounts exist is not available.

[113] *1993 Program Access Order*, 8 FCC Rcd at 3405, ¶ 105.

However, the spread between prices charged the largest and smallest MVPDs is generally believed to be at least 30%.[114] A negligible amount of this differential may be explained by differences in costs associated with delivering a programming stream to an MVPD or an MVPD's credit worthiness. Most of the difference, however, arises because small or medium-sized MVPDs have less bargaining power than larger ones.

Given that significant volume discounts exist, the lack of publicly available information about the size of the discounts creates an enforcement issue for MVPDs relying upon the program access rules. The problem most clearly arises when a small MVPD believes that a programmer affiliated with a rival cable operator, such as Comcast, is unfairly discriminating against it, and the MVPD only competes against larger MVPDs. In that case, the MVPD's argument can only be that the rates, terms, or conditions being offered or charged are discriminatory in comparison to those charged to a competing distributor that has far more subscribers. The difficulty for the Commission in these types of complaint cases is to determine whether the difference in price charged to the small or medium-sized MVPD is otherwise unfairly discriminatory.

To properly determine whether rates, terms, or conditions offered by the cable-affiliated programmer to the complainant MVPD are unfairly discriminatory, the Commission ideally would compare the terms offered by the cable-affiliated programmer to the rates, terms, and conditions charged by a non-cable-affiliated programmer to MVPDs of varying sizes to determine whether the differential under examination was unjustified. That is, with this data and

[114] *See* Statement of Ross J. Lieberman, Senior Vice President of Government Affairs, ACA, before Subcomm. on Regulatory Reform, Commercial and Antitrust Law, Comm. On the Judiciary, U.S. House of Representatives (June 24, 2014), http://1.usa.gov/1E3L4r8.

information, it would at least be possible to determine whether the differentials offered by the vertically integrated programmer exceeds industry standards for volume discounts among programmers who have no anticompetitive incentive to charge higher prices. If this data were available, the Commission would be in a far better position to accurately conclude when the price charged by a vertically integrated programmer is unjustifiably discriminatory. However, due to confidentiality provisions that keep the prices, terms, and conditions charged by the programming industry out of the hands of the Commission and others, the data necessary to reach these conclusions are not available.

Thus, rather than evaluate a complaint by a small MVPD in the proper manner discussed above, the Commission relies only upon data and information supplied by the programmer to determine whether the programmer is justified in charging the complainant a higher rate than the comparison case.[115] The program access rules permit the programmer to justify its price differential based on any of the four factors previously mentioned. However, justifying the price differential based on the volume discount factor is easiest because it not only permits differential pricing due to differences in the number of subscribers served by a distributor, but also due to "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[116] Accordingly,

[115] The programmer also has the right to respond by comparing the rate offered or charged to the complainant to a non-competing similarly situated MVPD to make the case that the rate being charged is not discriminatory.

[116] *1993 Program Access Order*, 8 FCC Rcd at 3407, ¶ 108.

programmers are permitted to justify a volume discount by citing non-cost economic benefits, such as increased revenue from delivering more viewers and advertising revenue.[117]

In summary, the volume discount standard is so porous that the Commission would have difficulty determining whether a higher price charged to a small or medium-sized MVPD is justified or not compared to the price charged to a larger competing distributor. In one of the few cases decided to date, the Commission described the difficulty putting this rule into practice:

> In order to decide allegations of price discrimination, the record must be able to reflect how these elements demonstrate legitimate additional costs that the programmer would not otherwise have incurred. Just as significant, a quantitative value must be related to these elements. In both areas this has proved a difficult challenge to the parties and to us in our attempt to decide this matter.[118]

Accordingly, the unduly restrictive requirement that MVPDs must file complaints alleging discrimination as compared against competing distributors combined with the permissible volume discount defense when the Commission lacks necessary industry-wide data to properly evaluate complaints, significantly reduces the value and effectiveness of the rules, particularly for small or medium sized MVPDs who typically only compete against far larger MVPDs. Since small and medium-sized cable operators must allege discrimination in comparison to a competing distributor, the vast majority of these operators are forced to compare themselves to larger MVPDs, which gives the programmer the opportunity to defend its pricing under the volume discount factor. If these operators could compare themselves to similarly sized non-competing MVPDs, the programmer could not defend its pricing differentials based on

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[117] *1993 Program Access Order*, 8 FCC Rcd at 3407, ¶ 108. We are unable to find any explanation for why the Commission chose to include non-cost benefits in its analysis, since they represent revenues to the programmer, not a cost of delivering programming.

[118] *Turner Vision, Inc.*, 13 FCC Rcd at 12612, ¶ 5.

volume discounting. By reducing the significance of the volume discount factor, the Commission would have an easier time of identifying unjustified discrimination and preventing vertically-integrated programmers from acting in an unjustified discriminatory manner, particularly against small and medium-sized MVPDs who are rivals to their affiliated-MVPD.[119]

It is therefore evident that the Commission's program access complaint procedures are ineffective at permitting the Commission to distinguish legitimate grounds for price differentials from illegitimate grounds. A cable-affiliated programmer understands that the Commission lacks an effective means to determine whether the price charged a small or medium-sized MVPD is justified in comparison to a large competing distributor, and therefore has not fear acting on its incentive to charge its rivals a higher price consistent with economic theory – the risk to a programmer of losing a program access complaint based on this set of facts is extremely low.

2. The Commission's rules fail to ensure MVPDs have information available necessary to determine whether a programmer is acting in a discriminatory manner.

In implementing the program access rules, the Commission recognized that MVPDs as potential complainants may not always have access to information necessary to properly evaluate

[119] To illustrate the problem, consider the case of a single cable operator with 5,000 subscribers that competes against three MVPDs: Comcast, DirecTV, and DISH in a market that is served by a Comcast-owned regional sports network. If in the small cable operator's negotiation with the Comcast RSN, the operator believes the rates, terms, or conditions being sought by the RSN are discriminatory due to the fact that Comcast is a rival, it would have no effective recourse under the program access rules. The rules prohibit the operator from bringing a complaint based on a comparison with a similarly situated cable operator purchasing the same programming in the same market who does not compete against Comcast. Instead, the small cable operator would be limited to claiming that it is being discriminated against in comparison to the rates charged a far larger Comcast, a case that likely could not be won given the volume discount defense. Although a complaint using DirecTV or DISH, which commonly has fewer subscribers in a Comcast RSN market than Comcast, albeit significantly more than 5,000 subscribers, as the comparable competing distributor would be unlikely to fare much better for the same reasons as a comparison with Comcast, but also because the small MVPD would be barred from making such a comparison because these operators are national providers whereas the cable operator is local. These flaws in the program access complaint rules restrict a complainant from making its strongest case for discrimination, while at the same time making it easier for a cable-affiliated programmer to defend itself.

whether a programmer is charging it discriminatory prices, and this may impair the effectiveness of the rules in preventing cable-affiliated programmers from offering or charging discriminatory prices. Therefore, the Commission established rules that would ensure that an MVPD's lack of information would not impede the filing of a complaint. However, as discussed below, under these procedures a potential complainant is still left without adequate information, leaving it without an effective means of identifying and taking action against discriminatory practices.

At the time the program access rules were implemented, the Commission recognized that the type of information an MVPD would need to determine whether it's being charged a discriminatory price may include a programmers' "rate card," standard contracts, or other pricing information regarding the programmers' service.[120] Believing that different programmers employ different sales practices and that programmers require flexibility in how they present their pricing information to an MVPD, the Commission also thought the programmer should have the choice of "whether to use a 'rate card' as well as the format and relevant pricing factors … with the proviso that such pricing information will play an integral role in a vendor's ability to justify rate differences."[121]

To resolve these competing interests, the Commission permitted an MVPD to make a certified request for information from programmers for such pricing information, and if the request is rejected or not enough information is provided to make a comparison, the MVPD is permitted to file a complaint without such information. The Commission thought this approach would "facilitate the process of resolving disputes by creating an incentive for vendors to use

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[120] *1993 Program Access Order*, 8 FCC Rcd at 3410, ¶ 112.

[121] *1993 Program Access Order*, 8 FCC Rcd at 3410, ¶ 112.

standard sales techniques and to make pricing information available as necessary to distributors."[122]

Although well intentioned, Commission's predictions have not come to true. Today, the combination of the programming industry's practice of keeping MVPDs in the dark regarding the rates, terms, and conditions charged to other MVPDs with the right of the programmer to ignore or not provide sufficient information to the MVPD's request for information makes it nearly impossible for an MVPD to determine whether a programmer is dealing with it in a non-discriminatory fashion. Programmers consider their pricing, terms, and conditions in each of their individual contracts as trade secrets and believe that if such data and information was made known to anyone but the parties to each contract, significant harm would come upon them.[123] Accordingly, programmers include in each of their contracts strong non-disclosure agreement provisions that prevent MVPDs from knowing what other MVPDs pay for the same programming. This industry practice makes it impossible for any MVPD to know whether it is being treated in a discriminatory manner by a programmer or not. At best, an MVPD may believe it is being offered excessive rates, terms, or conditions compared to other comparable programming that it carries, but this information is not informative with respect to whether an MVPD-affiliated programmer is charging its rival higher rates than a non-rival that is otherwise similarly situated for the specific programming being offered.

122 *1993 Program Access Order*, 8 FCC Rcd at 3410, ¶ 112.

123 *See, e.g.,* Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information, filed October 15, 2014 by CBS Corporation, *et al*., in the above-captioned proceeding; *See also CBS Corp., et al. v. FCC,* No. 14-1242 (D.C. Cir. 2014).

While the Commission's rules provide a mechanism for an MVPD to request information to determine whether a programmer is engaging in discriminatory conduct, the programmer may either fail to respond or provide insufficient information. Thus, unless the programmer responds to an MVPD's certified request with data and information that suggests the programmer may be treating it in a nondiscriminatory manner compared to another MVPD purchasing that programming, the potential complainant is left in the dark whether it is being discriminated against, and if so, to what degree.

In the event that the programmer does not respond, the rules grant MVPDs the right to file a complaint without the requirement of citing specific data or information demonstrating that discrimination is occurring.[124] In such a case, however, the MVPD is still required to base its discrimination complaint on a comparison to a competing distributor, but will have no information on which to make a determination which competing distributor will provide the best comparative for success on the complaint.[125] Considering the problems with the complaint process described in the preceding section, this further reduces the likelihood that an MVPD would believe that filing a complaint will be resolved in a favorable manner.

Both Congress and the Commission presume that vertically integrated programmers have the incentive and ability to discriminate against their rivals. In view of this, the Commission's rules impose an unreasonable burden on an MVPD to prove that it is being discriminated against rather than correctly putting the burden on the programmer to prove that it is not discriminating. Vertically integrated programmers understand the problems with the complaint process and the

[124] 47 C.F.R. § 76.1003(a)(4).

[125] 47 C.F.R. § 76.1003(a)(4).

burdens that the rules place on complainants, especially when a programmer does not respond to the MVPD's request for evidence of nondiscrimination, leaving the programmer with no incentive to ease that burden. At worse, a non-responsive programmer may find itself subject to a program access complaint where their risk of losing the complaint is low due to flaws in the complaint process previous discussed.

Accordingly, the widespread use of nondisclosure agreements combined with the right of programmers not to provide requested data and information or insufficient data and information, leaves MVPDs unable to ascertain whether they are being discriminated against by a programmer. If the MVPD elects to file a complaint, it then has the burden of correctly guessing which competing distributor offers the best comparable to itself for its complaint, and may only really verify whether it is being discriminated against by the programmer and to what extent in the discovery phase of the complaint. In the aggregate, the lack of a requirement that the programmer provide a requesting MVPD with specific information that would allow the MVPD to assess whether it is being discriminated against prior to filing a complaint significantly undermines the effectiveness of the rules and gives the programmer wide latitude to engage in discriminatory behavior with little fear of getting caught.

* * *

To be clear, as discussed below, ACA is <u>not</u> asking the Commission here to amend its program access pleading rules. ACA is asking that, to the extent the Commission relies on its program access rules and complaint procedures as the means of enforcing its non-discriminatory access condition, that it take into account the ineffectiveness of these procedures in preventing or ameliorate the merger-specific harms of the instant transaction. For the reasons stated above, because some of these procedures have flaws the Commission must not only adopt a non-discriminatory access condition but also include in its remedial conditions modifications to its program access complaint rules for use solely in program access complaints filed to enforce the remedial conditions imposed on this transaction. A discussion of ACA's proposed conditions to fix these problems follows the discussion immediately below of the problems with the Commission's baseball-style arbitration condition.

C. The Baseball-Style Arbitration Conditions Adopted in Prior Mergers Are Ineffective for Small and Medium-Sized MVPDs.

To date, arbitration conditions adopted in the *Comcast-NBCU Order*, intended to limit Comcast's ability to implement a uniform price increase strategy and charge rates above fair market value, have not proven effective for small and medium-sized cable operators. The Comcast-NBCU arbitration conditions implicitly rested, among other things, on the following key assumptions:

- At the time arbitration was commenced, the small or medium-sized MVPD would have some sense whether the vertically-integrated programmer is offering rates that are above fair market value;
- The MVPD would have sufficient information concerning the programmer's pricing to formulate a final offer that would have at least as good a chance of winning the arbitration as the programmer, a prerequisite to going forward.

Neither of these assumptions has proven to be correct, undermining the efficacy of the arbitration remedy for small and medium-sized MVPDs.[126] Underlying both of the incorrect assumptions is

[126] *See, e.g.*, ACA Comments, at 35-36, and Exhibit B (Fickle Declaration); *see also* Letter from Barbara Esbin to Marlene H. Dortch, in MB Docket No. 10-56 (Dec. 22, 2010) at http://bit.ly/13WPTmj, providing declarations of Colleen Abdoulah, Chairwoman and Chief Executive Officer of WOW! Internet, Cable & Phone, and Steve Friedman, Chief Operating Officer of WaveDivision Holdings, LLC d/b/a Wave Broadband, describing the difficulty and extraordinary cost of pursuing arbitration. *See* Abdoulah Declaration at ¶¶ 5, 9 and Friedman Declaration at ¶¶ 5, 8.

a single problem that undermines the effectiveness of the rules and procedures of the program access rules: small and medium-sized MVPDs do not have the critical information about the prices, terms, and conditions that the programmer charges other MVPDs in the market. The lack of information how a programmer charges other MVPDs for its programming, makes it nearly impossible for the MVPD to identify when it is being charged above fair market value, and to formulate an appropriate best and final offer in baseball style arbitration.

Neither an ACA member nor its bargaining agent can effectively determine in negotiations for one of Comcast's RSNs, an NBC O&O station, or for Comcast's bundle of national programming networks, whether Comcast is offering it rates above fair market value. MVPDs lack this information, as noted above, because it is the programming industry's practice – one followed by Comcast – to keep prices charged various MVPDs under tight wraps. As a result, each individual negotiating partner has no understanding whether the price it is being offered reflects fair market value, and whether the price is higher due to Comcast's vertical integration.

Making matters worse, there is a wide information disparity between the information available to a programmer affiliated with a large MVPD during the negotiation and prior to the start of the arbitration. The wide information disparity decisively tilts power in Comcast's favor, and the disparity is at its worst for small or medium-sized MVPDs. It is manifestly unreasonable to expect a party to invest in arbitration (i) with no understanding of key information and (ii) knowing that the opponent understands that same information. Without more information from the programmer, a small MVPD cannot accurately assess whether it is being charged fair market value or not. This undermines their perceived likelihood of success in arbitration, and ability to even formulate an appropriate final offer in baseball arbitration. For this reason, the baseball style arbitration condition has never lived up to its expectations as an effective remedy to the incentive and ability of vertically-integrated programmers to charge rates above fair market value.

* * *

ACA sets forth below a series of conditions that take into account the experiences of small and medium-sized operators with use of the non-discriminatory access condition and baseball-style arbitration remedy adopted in previous mergers involving vertical integration. If the Comcast-TWC-Charter transaction is approved, ACA believes that the following conditions would build upon what has come before them, and will restore the pre-transaction balance between Comcast and small and small and medium-sized MVPDs, and ultimately prevent their consumers from being subjected to unreasonable pricing or unfair discrimination resulting from the instant transaction.

IV. THE COMMISSION MUST ADOPT REMEDIAL CONDITIONS THAT OFFER SMALL AND MEDIUM-SIZED MVPDS MEANINGFUL PROTECTIONS AGAINST THE HARMS OF THIS TRANSACTION

As discussed above, the Commission has depended on both a non-discriminatory access condition that expressly prohibits exclusive deals and discriminatory practices, and on a commercial arbitration remedy to address the incentive and ability of vertically integrated providers to unjustifiably raise rivals costs through a uniform pricing strategy in nearly every transaction review that involved a combination of video programming and MVPD distribution assets.[127] Comcast itself continues to recognize the value of program access commitments and has included the following express commitment in its Public Interest Statement:

> **Program Access Commitment**. NBCUniversal will continue to make its programming available to MVPDs at fair market value and on non-discriminatory terms. . . As a safeguard, the NBCUniversal Conditions provide MVPDs the right to seek arbitration with respect to NBCUniversal networks in specific circumstances. . . . [T]his same commitment and approach will be extended to TWC's controlled programming networks as appropriate; for example, TWC's controlled RSNs will be subject to standalone arbitration.[128]

Comcast reiterates this same commitment in its Opposition to Petitions and Comments, adding specifically that "the MVPD arbitration condition in the *NBCUniversal Order* will extend to the small group of programming networks, including the Los Angeles Lakers RSN, TWC SportsNet, that Comcast will acquire as a result of the transaction. . . ."[129] This voluntary commitment offers a good first step in crafting a remedy adequate to ameliorate the competitive harms of the instant transaction.

ACA submits that the Commission should incorporate and expand upon the program access commitment offered by Comcast in crafting remedial conditions for the Comcast-TWC-Charter transaction. First and foremost, the Commission must return to its pre-Comcast-NBCU approach of imposing a non-discriminatory access condition and a commercial arbitration conditions for *all* classes of Comcast-affiliated and Charter-affiliated video programming, as

[127] In the *Comcast-NBCU Order*, the Commission also relied upon the commercial arbitration remedy to address harms that resulted from the ability of Comcast to jointly negotiate carriage for two or more "must have" programming assets in the same market (*e.g.*, a local broadcast station and a regional sports network in the same market.)

[128] Public Interest Statement at 108.

[129] Opposition at 87-88.

even the Applicants appear to recognize.[130] Yet that alone is not enough. As discussed below, the protections and rights against non-discrimination must be significantly bolstered to better ensure small and medium-sized MVPDs and their bargaining agents are not left unprotected from increases in Comcast's and Charter's bargaining position across all classes of its affiliated programming post-transaction. Moreover, modifications to the commercial arbitration remedy are necessary to make sure this mechanism is a realistic option for small and medium-sized operators so that the competitive harms of the transaction are not realized.[131]

A. The Commission Must Impose a Non-Discriminatory Access Condition to Prohibit Comcast- and Charter-Affiliated Programmers from Engaging in Discriminatory Practices and Ensure that Procedures for Enforcing this Condition are Effective for Small and Medium-Sized MVPDs.

The Commission has previously found it important to impose a non-discriminatory access condition on applicants in nearly every transaction involving the integration of video programming and distribution assets. In the instant transaction review, the Commission must again impose such a condition on Comcast and Charter covering all affiliated programming assets. This condition should state that Comcast and Charter and their existing or future national and regional programming services,[132] regardless of the means of delivery, and any broadcast station that Comcast owns or on whose behalf it negotiates retransmission consent, shall not

[130] ACA's references herein to "Comcast- and Charter-affiliated programmers" are meant to encompass all video programming assets owned or affiliated with either cable operator, including, as appropriate, national and regional cable programming networks, regardless of means of distribution, and any broadcast televisions stations owned or on whose behalf Comcast negotiates retransmission consent, as well as any programming assets of this nature that Comcast or Charter subsequently initiate, acquire or become affiliated with, including and broadcast television stations that Charter owns or on whose behalf it negotiates retransmission consent.

[131] ACA addresses necessary improvements to the Commission's commercial arbitration remedy below in Section IV.B.2., *infra*.

[132] Based on the Commission's program access attribution rules. 47 C.F.R. §§ 76.1000(b), 76.501 (Notes 1 and 2).

offer this programming or these broadcast stations on an exclusive basis to any MVPD, and Comcast and Charter and their affiliated programmers and broadcast stations, regardless of means of delivery, are required to make such programming and broadcast stations available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[133]

While the non-discriminatory access condition is important in its own right, adopting this condition and enforcing it through the Commission's program access rules and procedures alone will not be not sufficient as the enforcement procedures have the flaws demonstrated above that would limit the effectiveness of the condition, particularly for small and medium-sized MVPDs. The additional license conditions that fix flaws in the existing program access complaint procedures, discussed below, are required to ensure that post-transaction Comcast- and Charter-affiliated programmers cannot act on its incentive and ability to engage in discriminatory practices with respect to rates, terms, and conditions in the sale of programming to MVPDs.

1. An MVPD seeking to enforce the non-discriminatory access condition must have the right to bring a complaint comparing itself to a peer programming purchaser, regardless of whether the comparable distributor is the complainant's direct competitor or serves in the same geographic area.

As discussed above, the program access rules and procedures are flawed because they require that an MVPD is only permitted to bring a program access complaint alleging discrimination by comparing themselves against a competing distributor, defined as one where

[133] The Commission should adopt one small exception to the non-discriminatory access condition. The non-discriminatory access condition should not preclude Comcast- or Charter-affiliated programmers from offering capacity-constrained systems, also known as "non-rebuilt systems" individualized agreements that permit less onerous carriage obligations. For purposes of this exception, systems that are 750 MHz or greater in capacity or are digitized 550 MHz or greater capacity systems shall not be considered a capacity constrained system. Accordingly, an MVPD may not bring a complaint against a Comcast- or Charter-affiliated programmer under the non-discriminatory access condition for offering more favorable prices, terms or conditions to a capacity-constrained system.

there is some overlap in service territories. Furthermore, in determining whether an MVPD is a competitor, the Commission looks to see whether it serves in the same geographic market as the complainant, and whether it is local, regional, or national, based on how the MVPD buys and distributes programming. If the Commission uses the program access rules and procedures to enforce the non-discriminatory access condition, this flaw limiting the effectiveness of the program access rules will in turn limit the effectiveness of the non-discriminatory access condition. Accordingly, the Commission must include in its remedial conditions an alternative enforcement procedure for MVPDs wishing to avail themselves of the non-discriminatory access condition that addresses this flaw so that the condition is more effective than those imposed in the past, particularly for small and medium-sized MVPDs.

ACA proposes that the Commission make clear that an MVPD enforcing the non-discriminatory access condition through its program access complaint procedures be permitted to make its allegation of discrimination in comparison to *any* other comparable distributor that purchases that programming. Thus, an MVPD that competes against Comcast or Charter and believes that Comcast- or Charter-affiliated programmer is acting on its post-transaction incentive to charge it a higher fee may base its case by comparing itself to a distributor that is similar to it, regardless of the fact that the two MVPDs are not direct competitors. Furthermore, the Commission should eliminate the artificial regional/national distinction that may prevent a local MVPD from comparing itself to a similarly situated distributor solely because the comparable distributor is a regional or national provider of service.

By inviting comparisons to an MVPD that is similar, particularly in terms of the number of subscribers, the Commission will be able to more easily determine whether the Comcast- or

Charter-affiliated programmer is charging such an MVPD discriminatory rates, terms, and conditions because it will help reduce the weight of the volume discount defense that makes enforcement of non-discrimination prohibition extremely difficult, particularly in cases involving small and medium-sized MVPDs.

2. Comcast- and Charter-affiliated programmers must provide requesting MVPDs evidence that the rates, terms, and conditions offered are comparable to those charged comparable distributors.

To protect MVPDs from discrimination by Comcast- and Charter-affiliated programmers, the Commission must include as part of its remedial conditions a requirement that the programmer demonstrate, at the request of a negotiating MVPD, that it is offering prices, terms, and conditions are not discriminatory. In response to such a request, the Comcast- and Charter-affiliated programmers should be required to disclose information sufficient to establish that the offered rates, terms and conditions are comparable to those offered to the MVPD's peers. MVPDs need access to such information to make a fair assessment whether the terms being offered are non-discriminatory. There is ample precedent for imposing a disclosure requirement on Comcast- and Charter-affiliated programmers through remedial conditions far stronger than the information requests that may be served on cable-affiliated programmers under the Commission's program access complaint rules.

As part of its *Comcast-NBCU Order*, the Commission imposed a non-discriminatory access condition for the benefit of "qualified" online video distributors ("OVDs"), also known as the "Benchmark Condition," to "ensure that OVDs retain non-discriminatory access to Comcast-

NBCU programming while permitting the continued evolution of the online market."[134] The condition generally obligates Comcast-NBCU to make comparable online programming available on economically comparable prices, terms and conditions to an OVD that has entered into an arrangement to distribute programming online from one of more of Comcast-NBCU's programming peers. In crafting this condition, the Commission reasoned that "the best way to ensure that Comcast-NBCU treats such services fairly is to require it to offer its programming on terms comparable to those offered by its non-vertically integrated peers, which lack Comcast-NBCU's incentive to harm online providers."[135]

When an OVD sought to use the Benchmark Condition, Comcast quickly realized that in order to make such a non-discriminatory offer to the requesting OVD, it would need access to the programming agreements the OVD had for comparable programming with peer programmers. Comcast told the Commission that "NBCUniversal cannot comply with its obligation to shape an equivalent content license for a requesting OVD without appropriate disclosure of the baseline peer deal that NBCUniversal is expected to match. Lack of access to the peer deal frustrates a process that the Commission intended to be straightforward when it crafted the Benchmark Condition."[136]

The Media Bureau agreed with Comcast, ruling that the Benchmark Condition requires that an OVD seeking access to programming of a Comcast-NBCU programmer must disclose to

[134] *Comcast-NBCU Order*, 26 FCC Rcd at 4273-74, ¶¶ 87-90, 4360, Appendix A, Conditions, Section IV.A.2.b. ("Benchmark Condition").

[135] *Comcast-NBCU Order*, 26 FCC Rcd at 4273, ¶ 88.

[136] Letter from David P. Murray, Willkie, Farr & Gallagher to William T. Lake, Chief, Media Bureau, FCC, Re: Request for Clarification Regarding Implementation of the Benchmark Condition, MB Docket No. 10-56 at 1-2 (Feb. 17, 2012) ("Comcast Benchmark Ex Parte").

the Comcast-NBCU programmer, under appropriate confidentiality protections, the relevant "peer programming deal" that the Comcast-NBCU programmer is required to benchmark.[137] The Bureau found disclosure of peer agreements to be essential to the proper functioning of the condition.

> Disclosure of the terms of the relevant peer programming agreement will allow an OVD to establish that it has access to Comparable Programming and will allow a C-NBCU Programmer a reasonable opportunity to respond to an OVD request in a manner that will comply with the Benchmark Condition. Accordingly, we grant C-NBCU's request, in part, by clarifying that an OVD that invokes the Benchmark Condition must disclose the underlying peer deal to the C-NBCU Programmer upon its request.[138]

The Bureau felt so strongly that such disclosure was needed to ensure compliance with the condition that it specifically overrode non-disclosure provisions in existing contracts.[139]

The Commission's Benchmark Condition Order is important for several reasons. First, it confirms the Bureau's recognition of the importance of access to data and information sufficient to allow an entity required to make an economically equivalent offer of programming to ensure that its offer is in fact the economic equivalent of a peer programmer's agreement with the distributor requesting the offer. Second, it reflects Comcast's own appreciation of the need for access to peer programming agreements in order to formulate an economically equivalent offer of programing to a requesting distributor where its offer is subject to a non-discriminatory access condition.

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[137] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc*., MB Docket No. 10-56, Order, 27 FCC Rcd 15053, 15053, ¶ 1 (Media Bur. 2012) ("*Benchmark Condition Order*").

[138] *Benchmark Condition Order,* 27 FCC Rcd at 15058, ¶ 11.

[139]*Benchmark Condition Order*, 27 FCC Rcd at 15058, ¶ 12.

ACA recommends that the Commission adopt a remedial condition requiring a Comcast- or Charter-affiliated programmer, at the request of a small or medium-sized MVPD to provide data and information sufficient to permit the requesting MVPD to make an informed assessment whether it is being treated fairly vis-à-vis the treatment peer MVPDs are receiving. Under this condition, Comcast- and Charter-affiliated programmers will not have a right to refuse to supply information or to provide information insufficient to permit the requesting MVPD to assess whether the rates, terms and conditions it is being offered are comparable to those offered to its peer distributors.[140] Accordingly, information provided to a requesting MVPD must be derived from prices, terms, and conditions of agreements Comcast- and Charter-affiliated programmers have entered into with MVPDs comparable to the requesting MVPD. The information to be disclosed must be representative of the rates the Comcast- and Charter-affiliated programmer charges to a distributor comparable to the requesting MVPD and must not be so general so that it does not permit a complete assessment of the net effective value of all the prices, terms, and conditions of the contract. The requesting MVPD must be given the opportunity to identify specific MVPDs that they believe are comparable distributors. By allowing access to this information, the Commission will facilitate a small or medium-sized MVPD's ability to understand whether a Comcast- or Charter-affiliated programmer is discriminating among similarly situated MVPDs. This added protection may have the added benefit of creating a disincentive for Comcast and Charter to engage in such practices in the first instance.

[140] The Commission should make clear that a refusal to respond to a request with sufficient information is a violation of the conditions of approval, and a complaint may be brought on this basis. If the Comcast- or Charter-affiliated programmer is found not to have complied, the non-complying programmer should be subject to steep enough fines or other penalties to serve as a deterrent to such behavior.

Putting the burden on the programmer during negotiations to disclose adequate information to purchasing MVPDs about peer agreements will enable MVPDs to assess whether Comcast- and Charter-affiliated programmers are not acting on its incentive and ability to discriminate, and further the Commission's goal of "push[ing] the parties towards agreement prior to a breakdown in negotiations."[141] When negotiations fail, it will assist parties in determining how best to pursue remedies.

3. The Commission must give MVPDs the opportunity to subsequently audit Comcast- and Charter-affiliated programmers to ensure against discrimination, including post-agreement discrimination.

As discussed above, Comcast has agreed to make its affiliated programming and broadcast station signals available to MVPDs on non-discriminatory terms,[142] and this commitment should be memorialized and also extended to Charter-affiliated programmers through the non-discriminatory access condition. To make this guarantee of non-discrimination a reality, in addition to giving MVPDs the right to data needed to determine whether it is being offered nondiscriminatory rates, terms, and conditions in a contract negotiation prior to filing a program access complaint, the Commission must also adopt a mechanism to give MVPDs access to similar data subsequent to entering into the deal with the programmer. This will serve as an additional backstop to protect against programming agreements that are discriminatory or rendered discriminatory after the fact by virtue of a Comcast- or Charter-affiliated programmer subsequently entering into other more favorable deals with similarly situated MVPDs.

[141] *See Comcast-NBCU Order*, 26 FCC Rcd at 4262, ¶ 59.

[142] Application at 108; Opposition at 87.

Accordingly, in addition to providing MVPDs an effective means of determining whether the Comcast- or Charter-affiliated programmer is living up to its guarantee to not engage in discriminatory practices at the time that the MVPD is negotiating, an MVPD should be given the right to request an audit of relevant programming contracts between Comcast- and Charter-affiliated programmers and distributors to determine whether the Applicants have lived up to their commitments and continue to honor them. The Commission should specify that such an audit, which may be requested on an annual basis by any MVPD with an existing agreement with a Comcast- or Charter-affiliated programmer or broadcast station, would be performed by an independent third-party auditor or public accounting firm agreed to by the parties. The audit would review any and all records needed to verify and advise whether the programming contracts that the programmer has with the MVPD requesting the audit meets the non-discriminatory access condition. For efficiency and cost savings, multiple MVPDs seeking an audit should be permitted to coordinate so that a single firm may perform a collective audit. Designating a single month each year where requests for audits for that year would be submitted to the Comcast- or Charter-affiliated programmer can facilitate coordinated audits among MVPDs. Upon receipt of these audit requests, the programmer should be required to provide each requesting MVPD the names and contact information for the other MVPDs to facilitate coordination.

If the auditor determines that a Comcast- or Charter-affiliated programming agreement or agreements with other MVPDs is discriminatory with regard to one of the parties to the audit, the auditor shall so advise the affected MVPD and the programmer, and provide each the data and information that demonstrates discriminatory treatment. At such time, the Comcast- or Charter-affiliated programmer shall be given the opportunity to amend its contract with the MVPD to eliminate the discrimination. If the programmer does not voluntarily act to resolve the discrimination to the satisfaction of the MVPD, the MVPD shall have the right use the information provided by the auditor to bring a discrimination complaint under the non-discriminatory access condition. At the conclusion of any audit, the auditing firm shall submit a report to the Commission on the findings of its audit.

4. The Commission should clarify that an MVPD's bargaining agent shall have the right to utilize the non-discriminatory access condition just as MVPDs have been given the right to use a bargaining agent to utilize its commercial arbitration remedies.

Starting with the *News Corp.-Hughes Order*, the Commission granted MVPDs with 400,000 or fewer subscribers the right to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of programming subject to its commercial arbitration remedy and the programmer may not refuse to negotiate for such programming with such an entity.[143] The Commission specified that a "bargaining entity will have all the rights and responsibilities granted by these conditions."[144] In the *Comcast-NBCU Order*, the Commission revised its definition of a small MVPD and specified that MVPDs with 1.5 million or fewer subscribers may elect to utilize "an independent agent to bargain and (if necessary) arbitrate collectively on their behalf for access to Comcast-NBCU affiliated programming."[145] In the *Comcast-NBCU Order*, the Commission also extended the programming covered by the arbitration condition to

[143] *News Corp.-Hughes Order*, 19 FCC Rcd at 575, ¶ 223.

[144] *News Corp.-Hughes Order*, 19 FCC Rcd at 575, ¶ 223*; see also News Corp.-Hughes Order*, 19 FCC Rcd at 682, Appendix F, Conditions.

[145] *Comcast-NBCU Order*, 26 FCC Rcd at 4262, ¶ 58.

national cable programming owned or managed by Comcast, the programming that most small and medium-sized obtains through a bargaining agent.

The vast majority of small and medium-sized MVPDs depend on third parties to collectively negotiate most of their programming deals. Specifically, since adoption of the *Comcast-NBCU Order*, most of these MVPDs utilized a buying group, the NCTC, to negotiate for Comcast's national cable programming networks and O&O broadcast stations and to negotiate for Charter-affiliated programming.

The Commission's non-discriminatory access condition has never expressly stated that Comcast-affiliated programmers must treat the bargaining agents of small and medium-sized MVPDs in a non-discriminatory manner and that an MVPD's bargaining agent has the right to bring a complaint to enforce the condition, just as its principal has that right. Because the vast majority small and medium-sized MVPDs rely on third parties to collectively negotiate most of their programming deals, the non-discriminatory access condition would not provide small and medium-sized MVPDs protections unless these MVPDs may appoint a third party to bargain collectively on their behalf, and this third party negotiator is given the same protections as individual MVPDs. In any remedial conditions adopted in the instant review, the Commission should made clear that an MVPD with 1.5 million or fewer subscribers may utilize a bargaining agent to negotiate with a Comcast- or Charter-affiliated programmer and arbitrate collectively if necessary, and specify that the prohibitions on exclusivity and discriminatory treatment, and its enforcement mechanism, apply equally to negotiations with individual MVPDs as well as their bargaining agents.

5. The Commission should clarify that Comcast- and Charter-affiliated programmers cannot withdraw any programming from an MVPD during the pendency of a non-discriminatory access complaint.

Under the commercial arbitration remedy, upon receiving timely notice of an MVPD's intent to arbitrate, a Comcast- or Charter-affiliated programmer must immediately allow continued carriage of the programming under the same terms and conditions of the expired contract.[146] This interim carriage requirement prevents the programmer or broadcast station from utilizing a foreclosure strategy to prevent an MVPD from obtaining appropriate redress through the baseball style arbitration condition.

For the same reasons, the Commission must permit interim carriage for MVPDs seeking relief utilizing the non-discriminatory access condition. If the programmer is permitted to withhold programming from the MVPD while allegations of non-discriminatory treatment are being adjudicated, the harm that would come from the withdrawal of programming, which could potentially last months, will outweigh the benefits of prevailing in the complaint. It is essential that the Commission specify that upon receiving timely notice of an MVPD's intent to file a complaint under the non-discriminatory access condition, the Comcast- or Charter-affiliated programmer immediately allow continued carriage of the disputed programming under the same terms and conditions of the expired affiliation agreement, and such carriage will continue until resolution of the complaint. This interim carriage requirement should apply to all programming that is covered by the non-discriminatory access condition.

[146] This requirement for continued carriage does not apply when the dispute involves an MVPD's first time request for carriage of the programming. See *News Corp.-Hughes Order*, 19 FCC Rcd at 573, ¶ 221, 677, Appendix F, Conditions, Section III.

B. Conditions Preventing Comcast- and Charter-Affiliated Programmers from Charging Rates that Exceed Fair Market Value.

Not only must an MVPD have protections against a Comcast- or Charter-affiliated programmer exercising its incentive and ability to obtain discriminatory prices, terms, and conditions for its programming, but an MVPD must have protections against the programmers extracting prices, terms, and conditions above fair market value through a uniform price increases strategy. Preventing a Comcast- or Charter-affiliated programmer from using its increased market power post-transaction in this way is critical to preserving a competitive marketplace for all, particularly small and medium-sized MVPDs. In the *Comcast-NBCU Order*, to mitigate Comcast's ability to engage in a uniform pricing strategy to raise prices of its rivals, the Commission imposed an arbitration remedy and standstill relief on all Comcast-NBCU affiliated programming, not just RSNs and broadcast programming.[147] Based on input it has received from parties who considered utilizing the baseball style arbitration remedy,[148] ACA submits that adjustments to the arbitration remedy are necessary. The proposed changes discussed below will make the arbitration process more effective, which will have the benefit of pushing the negotiating parties to reach agreement without the need to actually take a dispute through arbitration.

[147] *See Comcast-NBCU Order*, 26 FCC Rcd at 4260, ¶ 52.

[148] *See* ACA Comments, Exhibit B, Fickle Declaration.

1. Upon request, a Comcast- or Charter-affiliated programmer should be required to provide data and information to the MVPD necessary for it to determine whether the offered rate is equivalent to fair market value and to formulate an informed "final offer."

ACA has explained in its Comments that the baseball-style arbitration remedy, even with one-way fee shifting, is of limited utility to small and medium-sized MVPDs because the widespread use of non-disclosure agreements in programming contracts leaves MVPDs in the dark with regard to whether offers by programmers are fair.[149] ACA highlighted that the lack of critical information hinders the effectiveness of the non-discriminatory access provision. The same problem exists with respect to baseball style arbitration.[150] Not only are small and medium-sized MVPDs unable to identify when they are being charged rates that are above fair market value, but the lack of information also hinders their ability to make an informed best and final offer at the start of the baseball-style arbitration process. This problem is exacerbated by the fact that a Comcast- or Charter-affiliated programmer, who knows how much it charges all MVPDs that carry its programming, has far more information at its disposal to make such a best and final offer. The lack of critical information leaves small and medium-sized MVPDs believing their likelihood of prevailing in the commercial arbitration process is so low that the costs of the process would likely outweigh the benefits even with the right to recover their fees upon winning. The Comcast- or Charter-affiliated programmer knows this as well, thus reducing

[149] ACA Comments at 33-36.

[150] This problem is most pronounced among small and medium-sized cable operators who do not carry regional and local programming from dozens of markets across the country and therefore do not have access to necessary data and information for comparable non-Comcast or non-Charter affiliated programming to determine whether the offers for programming are fair.

the credible threat that a dispute will be taken to arbitration, which in turn reduces the value of this remedial condition in ameliorating the harms of the transaction.

The process that ACA proposes above for ensuring an MVPD has access to data and information necessary to assess whether a Comcast- or Charter-affiliated programmer is charging it non-discriminatory rates, terms, and conditions has the added virtue of helping to address the information gap with respect to assessing whether the rates offered are above fair market value. However, in this case the information that must be provided to a requesting an MVPD to demonstrate that it is not being charged a rate above fair market value may be somewhat more expansive in scope than information intended to demonstrate only non-discrimination. Although the Comcast- or Charter-affiliated programmer cannot provide an MVPD with all the information that would be relevant to an arbitrator to determine which final offer is closest to fair market value, the information requested will provide the MVPD with significantly more information than it would have available today, increasingly the utility of the arbitration remedy. Moreover, it would reduce the significant disparity of information between the Comcast- or Charter-affiliated programmer and the MVPD.

2. The Commission should modify the baseball-style arbitration process by requiring the Comcast- and Charter-affiliated programmers to submit the first final offer.

A condition that requires the provision of relevant data and information to an MVPD seeking to utilize the baseball style arbitration remedy will help to reduce the large disparities of information between a Comcast- or Charter-affiliated programmer and the MVPD, but such a condition will not fully close the gap. Unless the negotiators are granted unimpeded access to all contracts of Comcast and Charter both as vertically integrated programmers and as distributors across all markets, there will remain an information advantage favoring the Comcast- or Charter-affiliated programmer in arbitration. Accordingly, MVPDs will believe their odds of winning the arbitration are low because they cannot predict the outcome of an arbitrator's calculation of fair market value for the programming at issue as well as the Comcast- or Charter-affiliated programmer, each of whom will be in a better position to do so. To further minimize this knowledge gap, the Commission should adopt an additional provision to baseball-style arbitration for MVPDs by requiring the programmer to first make its final and best offer, and then the MVPD may make their final offer after reviewing the Comcast- or Charter-affiliated programmer's final offer.

With access to the Comcast- or Charter-affiliated programmer's final offer, an MVPD will be better informed and much more able to submit a final offer that an arbitrator would deem closest to fair market value. Moreover, since the MVPD can base its final offer in reaction to the programmer's final offer, the Comcast- or Charter-affiliated programmer will be much more likely to submit a final offer closer to fair market knowing it unlikely that the MVPD will subsequently submit a proposal far outside the range of fair market value. The benefit of this new sequencing of submission of final offers will be that the parties will be more likely to submit final offers that are closer to each other, and that may lead to them reaching agreement at the offer phase without the need to go through the full arbitration.

C. Conditions Preventing Comcast's and Charter's Increased Size from Harming MVPDs in their Negotiations with Other Programmers.

ACA has demonstrated that the proposed transaction will greatly expand the bargaining leverage that Comcast and Charter have as MVPDs with other programmers.[151] This new harm calls for a new set of remedial conditions to mitigate, as best as possible, the harmful effects of the transaction.

1. Comcast should be prohibited from negotiating programming agreements on behalf of Bright House Networks and Midcontinent Communications.

If the proposed transaction is approved, Comcast will step into TWC's shoes with respect to Bright House Networks ("BHN") providing services including programming procurement to its 2.1 million subscribers.[152] Considering that Comcast currently provides similar services to Midcontinent Communications which serves 0.2 million subscribers, Comcast could potentially negotiate programming deals with programmers on behalf of approximately 31.4 million.[153] This incremental increase in buying power is significant, as it will strengthen Comcast's ability to negotiate better prices for programming, which may lead to other MVPDs paying higher programming prices themselves. In order to check this increased power, the Commission should at least prohibit Comcast from negotiating programming agreements on behalf of BHN,

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[151] *See* Section II, *supra*; ACA Comments at 23-27.

[152] *See* Biglaiser I at 3; ACA Comments at 23-27. *See also* Notice of Ex Parte Communication to Marlene H. Dortch, Secretary, FCC, from Steven J. Horvitz, Davis Wright Tremaine, MB Docket No. 14-57, (Applications of Comcast Corp., Time Warner Cable, Inc., Charter Communications, Inc. and SpinCo for Consent to Assign or Transfer Control of Licenses and Authorizations) filed Dec. 18, 2014, at 2 ("BHN maintains a Services Agreement with TWC, under which it continues to have access to TWC resources in exchange for a fixed fee. These resources include product development, engineering, programming and equipment procurement, and TWC's national Internet backbone (and associated interconnection and peering arrangements.").

[153] *See* Biglaiser I at 14-15, 24.

Midcontinent, or any other MVPD. Such a condition will not only avoid the potential for non-Comcast programmers to charge higher prices to small and medium-sized MVPDs, but will also help mitigate the harms that Comcast's size would cause independent programmers.

2. Comcast- and Charter-affiliated programmers should be prohibited from interfering with a third-party programmer's ability to provide any prices, terms, or conditions to an MVPD.

If the current transaction is approved, both Comcast and Charter will have increased bargaining power over third-party programmers, and can use their enhanced market power to demand concessions from these programmers in its negotiations that may influence the programmers' current or future dealings with other MVPDs. To minimize this risk, the Commission should impose a condition prohibiting Comcast and Charter from entering into or enforcing any agreement or arrangement under which Comcast or Charter would benefit from a third-party broadcast station, RSN, or national cable programmer making its content available to another MVPD on prices, terms, or conditions that are mutually agreeable to both parties. For example, if a third-party programmer enters into an agreement with a capacity-constrained MVPD that permits it to carry fewer programming networks on its system than it requires Comcast or Charter to carry, Comcast and Charter should be prohibited from requiring the programmer to offer such terms to them as part of an existing deal or a new deal. Additionally, Comcast and Charter should be prohibited from entering into and enforcing any agreement or arrangement discouraging or prohibiting a third-party programmer from entering into an agreement with another MVPD that is mutually agreeable to both parties. For example, the condition should prevent Comcast and Charter from entering into an agreement with a third-party programmer that prevents the programmer from offering to other MVPDs rates, terms and conditions that are within 10% of the net effective value of the prices, terms, and conditions that Comcast or Charter receive. Simply put, the Commission must ensure that post-transaction, Comcast and Charter are unable to use the enhanced market power they gain to unfairly disadvantage or interfere with other MVPDs in their dealings with third-party programmers.

D. Conditions Ameliorating Harms to Cable Spot Advertising Markets.

In its Comments, ACA described how Comcast will increase control of the spot cable advertising market, and potentially use its increased control of National Cable Communications ("NCC") as leverage over small MVPDs.[154] By acquiring TWC, Comcast will own 80% of NCC and will likely acquire veto authority at the board level, conferring upon it control of spot advertising to 57 of 69 million cable subscribers. Post-acquisition, Comcast will control over 50% of all Interconnects in the United States and 18 of the top 25 Interconnects. While acknowledging the additional control it will gain if the transactions are approved, Comcast disagrees that it will have anticompetitive effects, in part because advertisers support the transaction.

Small MVPDs, many of whom prefer to sell their own spot advertisements or work with independent spot advertising representatives such as Viamedia, Inc. ("Viamedia") are more wary, and rightly so. ACA takes no comfort from Comcast's Executive Vice President David L. Cohen's commitment that "Comcast will continue its policy of admitting all MVPDs to any interconnects that it manages."[155] While that statement may be true on its face, it says nothing

[154] All national advertisers place spot cable advertising through the NCC, which represents national spot advertising sales for cable, satellite, and Telco programming distributors across the nation. Comcast, TWC, and Cox Media, are owners of NCC.

[155] *See* Opposition at 277 n.875.

about what terms Comcast will demand before admitting MVPDs. Moreover, Comcast has not committed to allow MVPDs to continue their relationships with independents such as Viamedia. In fact, Comcast has said it does not typically contract with media firms such as Viamedia because, in its view, it "merely adds costs to the interconnect and benefits neither MVPDs nor advertisers."[156]

The Commission's focus must be on whether this transaction will reduce competition for advertising sales representatives in a market. The transaction will enhance Comcast's incentive and ability to prevent or make it more costly for small MVPD to elect to use a sales representative other than Comcast Spotlight. The right of an MVPD to choose to use a sale representative, like Viamedia, rather than Comcast Spotlight should not be restricted by Comcast due to its market power in regional Interconnects and control over the NCC. An MVPD may have valid reasons for not wanting to do business with Comcast Spotlight, such as not wanting to provide Comcast with its own ads, which may include its upcoming promotions in competition with Comcast, to run on its systems. Actions by Comcast to prohibit cable operators the right to join regional interconnects and the NCC or charging them unfair rates based on their choice to either sell local advertising on their own or with the help of a sales representative will harm competition and consumers.

To address these concerns, ACA recommends the Commission adopt the following remedial conditions:

1. Comcast shall be prohibited from taking any action that serves to exclude any MVPD from participating in any regional Interconnect or the NCC based on the MVPD's election to sell

[156] *See* Opposition at 277 n.876.

its spot cable advertising inventory on its own or through any spot cable advertising representation firm of its choosing.

2. Comcast shall be prohibited from taking any action that serves to prevent a regional Interconnect or the NCC from doing business with any MVPD at fair market value and on non-discriminatory rates, terms, or conditions based on the MVPD's election to sell its spot cable advertising inventory on its own or through any spot cable advertising representation firm of its choosing.

E. These Conditions Must Remain in Effect for a Minimum of Nine Years, and Removed only Upon Application.

This transaction can only be approved if conditioned in the manner ACA recommends. It is vital, that if such conditions are imposed, the conditions are long-lasting because the harms resulting from this transaction are unlikely to dissipate over time. In 1992, Congress recognized that vertical integration of programming and distribution assets give vertically integrated programmers an incentive and ability to disadvantage the rivals of their affiliated-MVPDs and adopted program access rules to address this concern. In 2003, the Commission reached the same conclusion in its review of the News Corp.-Hughes transaction, and imposed conditions on the merged entity to address this concern, and within the next decade, reached the same conclusion in reviewing the Adelphia-Comcast-TWC and Liberty-News Corp.-DirecTV transactions. Most recently, in 2011, the Commission reached the same conclusion in its review of the Comcast-NBCU transaction. Thus, over the last two decades, Congress and the Commission's concerns about the harms of vertical integration in the MVPD marketplace have not changed, and there is no evidence to suggest that these concerns will not continue to be warranted in the future.

Accordingly, any conditions applied must remain in effect for at least nine years following the close of the transaction. After nine years, the conditions should not automatically expire. The Commission should require Comcast and Charter to return to the Commission and apply for relief, making the case that some or all of the applicable conditions are no longer necessary to protect competition and consumers. Moreover, with regard to the non-discriminatory access condition and the commercial arbitration remedy, there is significant risk that a Comcast- or Charter-affiliated programmer will seek to retaliate against any MVPD who utilizes either the condition or remedy to reach a deal in the future. Such retaliation is likely to come at the time that the agreement that was fashioned through either the condition or remedy expires and a new agreement for the programming must be negotiated. For this reason, irrespective of whether the condition or remedy still applies, any MVPD that used the condition or remedy for an existing deal shall have the right to use the condition or remedy for its renewal. Only after the Comcast- or Charter-affiliated programmer and the MVPD enter into a subsequent agreement without needing to use the non-discriminatory access condition or arbitration remedy, would the MVPD lose the right to utilize the condition or remedy in the future.

Imposing conditions on Applicants to a license transfer or assignment for a period of time not defined by a set number of years is not unprecedented. In the *Liberty-News Corp.-DirecTV Order*, the Commission ruled that its non-discriminatory access condition shall be imposed until "the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DirecTV *or* the Commission's program access rules no longer remain in effect."[157] For the past eight years and counting, the non-discriminatory access condition has

[157] *See Liberty-News Corp.-DirectTV Order*, 23 FCC Rcd at 3341, Appendix B, Conditions, Section III.6.

applied to DirecTV and its affiliated-programming, and with no indication that Congress intends to eliminate the program access rules, the condition should remain imposed for the foreseeable future.

For the dozens of ACA members who directly compete with Comcast, TWC, and Charter cable systems in multiple markets, and for those who purchase must-have programming from Comcast- and Charter-affiliated programmers, meaningful and enforceable conditions, with active oversight, are essential to maintaining the vibrant and competitive marketplace that Comcast claims to exist today, and maintaining them for an extended period of time is essential.[158]

V. CONCLUSION

The proposed transaction involving Comcast, TWC and Charter is a *very* big deal, and a significant portion of the industry and consumers will be harmed if it is approved without sufficient, effective, and long-lasting remedial conditions. The conditions ACA proposes are targeted to address the demonstrable harms of the transaction, crafted to address flaws and shortcomings with the types of remedial conditions the Commission has imposed in the past, and

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[158] *See* Opposition at 15.

utterly essential to protect MVPD competition and consumers of MVPD services should the parties go forward.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: Barbara Esbin

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
One Parkway Center, Suite 212
Pittsburgh, PA 15220
(412) 922-8300

Ross Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
Cinnamon Mueller
1875 Eye Street, NW
Washington, DC 20006
(202) 872-6811

David A. LaFuria
Brooks E. Harlow
Lukas Nace Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
McLean, VA 22102
(703) 584-8678

Attorneys for the American Cable Association

EXHIBIT

REDACTED FOR PUBLIC INSPECTION

The Harms of Comcast-TWC Transaction II*

Gary Biglaiser**

December 23, 2014

* Prepared for the American Cable Association.

** Professor of Economics, University of North Carolina, Chapel Hill. FCC Assistant Chief Economist 1997-1998.

Table of Contents

I. INTRODUCTION

In my previous paper, I presented evidence and analysis demonstrating why the Comcast-Time Warner Cable-Charter transaction will result in substantial vertical harm.[1] Comcast presented a paper authored by Gregory Rosston and Michael Topper, responding to my report, and others.[2] In this paper, I briefly describe and compare the methodology used in my analysis, which led to a conclusion that the transaction will cause substantial vertical harm, with that used by Rosston and Topper, who were able to obtain results showing that the transaction will result in only a relatively small vertical harm. Next, I discuss why the inputs selected by Rosston and Topper, and reasoning applied to obtain their result, are not appropriate. Specifically, Rosston and Topper have used an artificially low departure rate by selecting programming disputes and data sources that are more likely to support the desired result. I then discuss some additional issues regarding the harms of the proposed merger. Finally, I examine the horizontal harms.

II. REVIEW OF FORMULAS USED TO COMPUTE VERTICAL HARM USING THE BARGAINING MODEL

A. Biglaiser Analysis.

My analysis of the vertical harm was based on the same bargaining model used by the Federal Communications Commission ("FCC" or "Commission") in its review of the Comcast-

[1] Gary Biglaiser, "The Harms of Comcast-TWC-Transaction," ("Biglaiser I") appended to Comments of American Cable Association in Docket No. MB 14-57 (August 25, 2014) ("ACA Comments"). *See* http://bit.ly/1z8soU3.

[2] *See Opposition to Petitions to Deny and Response to Comments, filed by Comcast Corp., Time Warner Cable, Inc., Charter Communications, Inc., and SpinCo, Docket No. MB 14-57* (September 23, 2014) ("Comcast Opposition") at Exh. 2 (Gregory Rosston and Michael Topper, "An Economic Analysis of the Proposed Comcast Transactions with TWC and Charter in Response to Comments and Petitions" (September 20, 2014)) ("Rosston and Topper")). *See* http://bit.ly/1xsnVLr.

NBCU merger.[3] The harm I identified was based on Comcast having an incremental increase in the opportunity cost of selling programming to rival due to:

- the increase in its footprint following the proposed merger with Time Warner Cable, Inc. (“TWC”);
- transactions involving systems sales and swaps with Charter Communications, Inc. (“Charter”), and
- Comcast’s increased profit per subscriber, post-merger.

I demonstrated that Comcast’s opportunity cost of selling programming to rivals consists of the product of three variables: (1) the departure rate – the probability that a consumer would leave the rival multichannel video programming distributor (MVPD) if the programming was withdrawn by Comcast; (2) the diversion rate – the probability that the consumer would go to Comcast; and (3) the profit per video subscriber that Comcast would obtain from selling the consumer its video services; all divided by two, which represents the Nash Bargaining Solution parameter. To determine the incremental increase in Comcast’s opportunity cost of selling the programming, I conservatively assumed that the departure rate and profit per video subscriber do not change due to the merger. I further assumed that only the diversion rate changes due to Comcast’s increased footprint with rival MVDPs.

To compute the diversion rate, one could review Comcast’s household footprint both pre-merger and post-merger, and compare it to other MVPDs in the market. The footprint overlap between Comcast and a rival MVPD provides, for each of their total possible households, the proportion over which they compete against each other. It is in the overlap areas where Comcast

[3] *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4247 (2011) (“*Comcast NBCU*”).

has an opportunity to attract a subscriber from its rival, and where the rival can do the same. According to information provided by Comcast, the deal will increase Comcast's homes passed from approximately 47 million to approximately 66 million. I assumed that Comcast's share of the MVPD market share is proportional to the diversion rate. This relationship should be interpreted as the quality-price relative value of Comcast's video offering to its rival's offerings in the market. I further assumed this to be similar across all markets. An implication of this assumption is that the current Charter and TWC systems are, or will be soon be, at the same quality-price point relative to rival MVPDs.

I computed the change in market overlap for Comcast and, (1) the two DBS providers (DISH Network and DirecTV), (2) Verizon, and (3) the membership of the National Cable Television Cooperative ("NCTC"), the buying group through which more than 900 small and medium-sized MVPDs purchase their video programming. I also separately computed the overlap between Bright House Networks ("BHN") and the same three sets of MVPDs, because Comcast may step into TWC's shoes as the provider of programming services to BHN. This analysis was done for the national market of the NBCU cable networks, and the local markets of the ten owned and operated ("O&O") NBC broadcast stations.

My paper demonstrated that the transaction would result in significant vertical and horizontal harms. Regarding vertical harm, there is a significant increase in the overlap between Comcast and other MVPDs, as shown in Table 1 of Biglaiser I (see below) which will increase Comcast's opportunity cost of selling programming. Using the bargaining model, this will lead to significant price increases to rival MVPDs, which in large part must be passed onto their subscribers. Furthermore, if any merger efficiencies are realized, they increase Comcast's opportunity cost to sell its programming, again leading to higher prices for rival MVPDs subscribers.

Change in Competitive Overlap with Comcast Resulting from Transaction with Respect to Comcast's National Cable Programming Assets[4]

MVPDs Other than Comcast, BHN, and Midcont.	Subs	Pre-Merger Competitive Overlap with Comcast	Post-Merger Competitive Overlap with Comcast	Difference	Competitive Overlap with BHN	Total Difference
DIRECTV	20.2M	35%	50%	15%	3%	18%
DISH Network	14.1M	35%	50%	15%	3%	18%
NCTC	9.0M	20%	22%	2%	4%	6%
Verizon	5.4M	41%	67%	26%	7%	33%
AT&T	5.9M	N/A[5]	N/A	N/A	N/A	N/A
Other MVPDs	14.0M	0	0	0	0	0

The horizontal harms are due to Comcast acquiring TWC's RSN's in Los Angeles and New York, the nation's two largest media markets. In both, Comcast's NBC O&O's will enhance Comcast's bargaining power to the detriment of small MVPD rivals. In addition, by adding nine million subscribers, Comcast will be able to obtain programming at lower prices, which will enhance its profits and lead to higher opportunity costs of selling its programming. I

[4] The same conclusions about Comcast's opportunity cost increasing as a result of this transaction may be reached with regard to Charter's opportunity cost with respect to its attributable programming, like Discovery and Starz. If this transaction is approved, Charter's homes passed from increases from 12.2 million to 13.7, and when SpinCo's 5.6 million homes are included, Charter's total homes passed totals 19.3 million. With regard to the DBS providers, this is an increase of 1.1% for Charter, and 5.2% when the change for Charter is added to the change for SpinCo. With regard to ACA members who regularly participate in NCTC negotiated transactions with Comcast, the Charter swaps with Comcast results in these MVPDs' competitive overlap with Charter increasing by 4.36%. Including SpinCo, the combined overlap is an increase of 9.16%. ACA's data for Verizon's competitive overlap with Charter shows it decreasing by 3.5%. ACA does not have reliable data for AT&T. Given these results, consumers overall will likely be harmed by the Comcast-TWC Charter deal as a result of the increased homes passed of Charter and SpinCo and its competitive impact on MVPDs who serve a majority of customers whose MVPDs are affected by the vertical harm.

[5] Due to a lack of publicly available data and information about the video footprint of AT&T, ACA is unable to determine the company's pre-merger and post-merger footprint with Comcast and its affiliates.

concluded in Biglaiser I that the remedies from the Comcast-NBCU merger are inadequate to prevent the harms from the Comcast-TWC-Charter transaction.

Although my first paper focused on the increased incremental harm that the merger would cause to Comcast's MVPD rivals, who seek Comcast-affiliated programming, I also performed a similar pre- and post-merger competitive overlap analysis for Charter.

B. Rosston and Topper Analysis

i. Foreclosure Model

Rosston and Topper's initial attempt to demonstrate that the Comcast/TWC/Charter transaction will not result in any competitive harm were based on a foreclosure model. In the foreclosure model, they calculated the minimum departure rates that purportedly would make it profitable for Comcast to permanently foreclose one of its rival MVPDs. The costs of permanent foreclosure are the lost advertising and programming fees, while the benefit is that some subscribers will switch to Comcast.

The foreclosure model is not the best way to determine whether the merger will have anticompetitive effects, because even if the departure rate is high enough to make permanent foreclosure profitable, Rosston and Topper's calculation was done using pre-merger programming prices. If there are gains to trade between Comcast and a rival MVPD, then the programming price that Comcast charges to the rival could rise just enough so that Comcast would be better *off not* foreclosing the rival MVPD. This will lead to higher costs for the rival MVPD and most, if not all, these cost increases will be passed onto its subscribers. The FCC recognized this in the Comcast-NBCU transaction, and thus it also analyzed that transaction using the bargaining model.

ii. Bargaining Model

I will address why the bargaining model is an appropriate framework to analyze the vertical harm from the transaction. Further, I will demonstrate that the model actually underestimates the competitive harm, since it is a static framework and does not take into account reputation effects.

Rosston and Topper take issue with use of the bargaining model to measure the vertical harm of this transaction, claiming that the bargaining model is not a realistic representation of Comcast's position in programming negotiations.[6] They make three assertions: First, parameters such as departure rates are unknown and thus the model's predictions are not useful. Second, the model does not take into account transaction-related efficiencies. Finally, by design the price increases predicted are the same for all programs involved, and for all viewing options available to consumers, when in practice they are not.[7]

None of these claims are correct. Moreover, Rosston and Topper provide no evidence that the bargaining model is biased against Comcast. Rather, the bargaining model is well suited to analyze the competitive harms of the Comcast/TWC/Charter transactions. As discussed by Deputy Assistant Attorney General Aviv Nevo in a recent speech, the Nash Bargaining Solution is a useful framework to analyze negotiations between providers and distributors, and it has been successfully employed empirically many times. It has also been used as commentary for the Horizontal Merger Guidelines.[8]

[6] Rosston and Topper, at ¶ 176.

[7] *Id.*

[8] Aviv Nevo, "Mergers that Increase Bargaining Leverage," Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries, January, 2014 (available at: http://www.justice.gov/atr/public/speeches/303149.pdf).

In the Commission's review of Comcast/NBCU and other mergers involving the integration of an MVPD and programming, it has relied on the bargaining model to assess whether the proposed transaction would result in vertical harm. Rosston and Topper introduce no probative rationales that Comcast has not previously advanced during the Comcast/NBCU review, suggesting that the Commission depart from relying on the bargaining model.

Since the Commission's utilization of the model in Comcast/NBCU, economists have relied on the bargaining model to demonstrate competitive harm due to vertical integration in the MVPD and programming marketplaces. In a 2013 paper by Caves, Caves, and Singer,[9] the authors rely on the bargaining model to find that RSNs owned by an MVPD charge higher prices for that programming than if they were not owned by an MVPD.[10] In other words, the authors used the bargaining framework to predict direct, real-world, marketplace outcomes.

Contrary to the assertions of Rosston and Topper, the model can encompass different price predictions for different programs and different viewing options for consumers. In the former case, the more popular program will have a larger price increase than a less popular program. The price difference will be reflected in the different departure rates. In the latter case, for both the larger number of viewing options and the popularity of these options, a lower price increase would be predicted for Comcast, since this will lead to a lower diversion rate, α.

To the extent that the bargaining model does not fully capture the bargaining relationship between a programmer and an MVPD, what is not captured is not significant to the model's results. Moreover, what is not captured, such as a reputation effect, biases the estimate of

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[9] Kevin W. Caves*, Chris C. Holt and Hal J. Singer, "Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks," *Review of Network Economics*, 2013, Vol. 12 (1), pp. 61-92.

[10] *Id.* Significantly, paper finds "the vertical integration premium increases significantly with the local downstream market share of the RSN's affiliated distributor," a conclusion that is consistent with my own analysis.

Comcast's opportunity cost of selling programming in Comcast's favor. Since Comcast sells its programming to many MVPDs, it would like to establish a reputation of being a tough bargainer to signal to other MVPDs not to expect a low price. The bargaining model would estimate a lower price for Comcast to sell its programming than if the reputation effects were taken into account. Rosston and Topper's assertion that the bargaining model is unable to account for variables in a negotiation between a programmer and an MVPD is incorrect, and their conclusion based on this claim is therefore flawed.

Despite arguing that it is not an appropriate tool for this purpose, Rosston and Topper use the bargaining model to estimate the increase in Comcast's opportunity cost. They performed this exercise for the NBCU suite of national cable programs, the ten NBC O&Os, and three regional sports networks ("RSNs"), two of which are TWC RSNs that Comcast proposes to acquire in this transaction. For the pre-merger and post-merger diversion rate, they used Comcast's market share before the merger. To compute the post-merger diversion rate they include the additional TWC and Charter systems that will be acquired in each market.[11]

As discussed below, I do not agree that Rosston and Topper's opportunity cost estimates are correct because they used incorrect inputs for the bargaining model. In particular, they underestimate the true opportunity cost incurred by Comcast of selling its programming. Thus, their conclusion that there will be miniscule harm is not correct.

[11] Rosston and Topper do not consider the footprints of Comcast and rival MVPDs. It is unclear what their market share means when examining MVPDs other than the two direct broadcast satellite (DBS) providers. The footprint of both DBS providers overlaps completely with Comcast. In the bargaining model that I presented in my earlier paper, this is the case when $\theta=1$. For non-DBS MVPDs such as ACA members and the large telcos, AT&T and Verizon, the market overlap with Comcast is clearly not 100%. It is the change in market overlap that is important. The market shares that are in the α's in the formula to compute the opportunity cost for Comcast to sell its programming for the bargaining model can be thought of as proxy for how consumers view quality price offerings of Comcast with other MVPDs.

III. EXAMINATION OF SPECIFIC PROBLEMS IN ROSSTON AND TOPPER ESTIMATE OF VERTICAL HARMS

In this section, I take issue with the methodology that Rosston and Topper used to derive two parameters of the bargaining model: the departure rates and profit level. I also discuss their regression analysis, which produces unreliable results.

A. Departure Rates

Rosston and Topper claim that the events they used to study departure rates are more appropriate than the Fisher-DISH dispute used by the FCC in the Comcast/NBCU merger. The Fisher-DISH dispute lasted for about 200 days from late 2008 through June 2009 and involved ten broadcast television stations in seven markets. In the *Comcast NBCU* Order, the Commission found "DISH lost a statistically significantly number of subscribers in a 6 month period."[12] Relying on the departure rate determined from this dispute, the Commission concluded that Comcast will raise its rivals' costs using the bargaining model it accepted.[13]

Rosston and Topper reject the departure rate that the Commission used in the *Comcast NBCU* Order, based on the Fisher-DISH dispute. Instead, they come up with a new, significantly lower departure rate based on two new events. First, they used the Media General-DISH Network dispute, where stations in 17 television markets were withdrawn for 46 days.[14] The second event they used is the CBS-Time Warner Cable dispute, where stations in six television markets were withdrawn for 32 days.[15]

[12] *See Comcast NBCU, supra*, at Appendix B, ¶ 34.

[13] *Id.*, at Appendix B, ¶ 47.

[14] This blackout started on October 1, 2013 and ended on November 16, 2013.

[15] This blackout started August 2, 2013 and ended on September 2, 2013.

I first discuss the problems with the General-DISH Network dispute. The Rosston and Topper analysis is based on flawed data, making their departure rate unreliable. The data is not from internal subscriber data of the MVPDs involved in the dispute to determine the number of subscribers that the MVPDs had on the first and last days of the dispute in the markets affected by the blackout, and in their control groups. Instead, Rosston and Topper relied on quarterly subscriber data from SNL Kagan, a market research firm.[16]

There are significant problems with using Kagan data to estimate the departure rate for an MVPD that has a dispute with a programmer. Kagan's cable subscriber data is derived from semi-annual copyright filings made by cable operators, who are required to report their subscriber totals on a market-by-market basis for the end of the second and fourth quarters of each year. To derive first and third quarter subscriber counts on a market-by-market basis, Kagan does a smoothing calculation between the two reported observations. Thus, Kagan's subscriber data for March 30 (first quarter) and September 30 (third quarter) are not actual observations, but just interpolations of the June 30 (second quarter) and December 31 (fourth quarter) observations. Based on conversations with Kagan, its smoothing calculating for determining subscriber counts for the first and third quarters for an MVPD, *does not* take into account the impact of a programming blackout. Accordingly, I conclude that this data developed by Rosston and Topper is of little value in developing an appropriate departure rate.

With regard to the satellite TV provider data, the numbers are significantly less reliable, particularly on a market-by-market basis. Unlike cable, satellite TV providers are not required to semi-annually report their subscriber totals on a market-by-market basis. These operators only report their nationwide subscriber totals for the second and fourth quarters. Thus, Kagan's

[16] From Rosston and Topper Tables III.C.6 and III.C.7.

"market-by-market" data is based actually an internal estimate of each satellite provider's subscriber counts in each market. Kagan has no source for actual market-by-market subscriber counts for each satellite TV operator. In determining how to adjust their satellite TV provider subscriber counts in each market on a quarterly basis, particularly in the second and fourth quarters where actual cable subscriber numbers are available for each market, Kagan examines whether cable has gained or lost subscribers in each market. Kagan considers the loss of subscribers by cable in a market as a gain for the two DBS firms; however, Kagan has no way of knowing. Kagan's methodology leaves significant challenges in estimating how consumers allocate themselves across the two satellite operators in each market.

Given the limitations set forth above, the Commission cannot rely upon Kagan data proffered by Rosston and Topper to calculate the departure rates for the Media General-DISH dispute. The following are some obvious reasons. First, Kagan has no actual data source for subscriber totals for satellite TV providers on a market-by-market basis. Thus, Rosston and Topper's reliance on subscriber numbers in the markets where the blackout occurred, and in the markets they used as a control, are not reliable for determining DISH's subscribership before the start of the blackout and after the end of the blackout.

Second, even assuming that changes in satellite subscribership in the affected and control markets could be measured based on estimated cable gains in subscribers, Kagan has no way of accurately determining whether those cable gains came from DISH or DIRECTV. Third, the blackout occurred from October 1 to November 16, 2013. Thus, the event occurred in the middle of two actual observations for the satellite TV provider. The event started at the start of the fourth quarter where there was a reliable nationwide reporting of subscriber totals for DISH from its quarterly report to the SEC, but ended approximately 45 days before the next reliable nationwide reporting date – the end of the fourth quarter. Put another way, the 46-day event lasted about 50% of the actual 90-day period between observations of its national subscriber. This skews the ability to accurately determine the impact of a blackout over the period of time that subscribers are without the programming. For instance, there is no way of backing out the subscribers that may have been gained in the 45 days after the end of the blackout.

For all these reasons, use of Kagan data for the Media General-DISH dispute to compute the departure rates for this merger leads to the wrong conclusion. Given the poor quality of the data used to compute the departure rates, it is not at all surprising that the growth rates in subscribers do not differ much between the treatment and the control Designated Market Areas ("DMAs"), and thus the small estimate in the departure rates from withholding programming. The Commission must reject Rosston and Topper's analysis.

Turning to the second blackout event that Rosston and Topper used to estimate the departure rate -- the CBS-TWC dispute -- in this case Rosston and Topper had actual departure data at a monthly level. Nevertheless, this event does not provide an appropriate comparison.

First, the event lasted only 32 days. The departure rate used for the bargaining model is based on a permanent foreclosure of the covered programming, and therefore shorter blackouts are less reflective of the actual departure rate. The dispute between Fisher and DISH lasted 200 days, providing the Commission with a longer time frame to determine the appropriate departure rate of customers based on the withdrawal of must have programming. Using a dispute that is of sufficient length is important to ensure that the analysis takes into account subscribers who have the patience to stick with their MVPD for a short time (e.g., 45 days), but would depart in a protracted dispute.

Moreover, a longer dispute ensures that the particular timing of the dispute is not a significant factor in whether consumers choose to depart the MVPD. The Commission's analysis was based on actual data from an MVPD involved in a long dispute, including months with NFL games and first-run broadcast programming, which is highly relevant to departure rates. If the CBS/TWC dispute dragged on longer, it is reasonable to assume the number of consumers leaving TWC would have grown. Due to the short duration of the event, the CBS/TWC dispute likely significantly understates the actual departure rate, and therefore it is not appropriate for the Commission to rely upon it here.

Second, the timing of the CBS/TWC Dispute, which occurred mostly in August, makes it unreliable because viewership of broadcast stations is particularly low in August and therefore subscribers are likely less inclined to abandon their pay TV provider.[17] The ratings are low because the month has few popular sporting events or awards ceremonies that are televised and it is outside the general fall and spring television seasons. There are no regular season NFL games scheduled, which are often the highest rated programs on broadcast television. Broadcast networks mostly air reruns, which do not generate the same ratings as first run programs.

It is no coincidence that the settlement between CBS and TWC occurred just before the start of the NFL season in September. If the blackout occurred during almost any other month of the year, the departure rate would likely have been substantially higher than the one cited by Rosston and Topper. Thus, the timeframe for the blackout likely vastly underestimates the true departure rate for the loss of a Big Four network affiliate.

[17] According to a press release from CBS Television Studios dated August 8, 2013, "August is traditionally one of the lowest months of the year for ratings and advertising revenue." *See* http://bit.ly/1wnny39.

The two events that Rosston and Topper used to calculate departure rates provide no evidence that the actual departure rate will be as low as they predict. Their use of these inappropriate events leads to an invalid conclusion that the bargaining model computes a small price increase from programming due to the merger. In my view, it is highly likely that they have significantly underestimated the level of price increase that will occur due to the merger. Absent better evidence, it makes sense for the Commission to continue to rely on the Fisher/DISH dispute to calculate departure rates.

In their Foreclosure analysis, Rosston and Topper implicitly acknowledge that the Comcast-TWC-Charter transaction will increase the opportunity cost of Comcast selling programming to rival MVPDs. Since the critical departure rates that they computed in the Foreclosure model are lower post-merger, this implicitly concedes that Comcast's opportunity cost of selling programming to rival MVPDs is higher after the merger than before it.

Comcast claimed that the departure rate for the suite of NBCU programming would be lower than that for an NBC O&O.[18] In fact, the Commission found in *Comcast NBCU* that the bundle departure rate is" greater than the departure rate we predict for any individual O&O station."[19] Thus, the departure rate for the NBCU suite should not be reduced by a factor of {{[redacted]}}, as Rosston and Topper did in computing the departure rate.[20]

[18] *See* Comcast Response to FCC Information and Data Request, Request 23, Highly Confidential Exhibit 23.1, at ¶ 39.

[19] *See Comcast NBCU, supra,* at Appendix B, ¶46.

[20] *See* Rosston and Topper, at ¶166.

In sum, the departure rate analysis done by Rosston and Topper is flawed. The Commission should continue to rely on the data it collected in the Fisher-DISH dispute to calculate departure rates.

B. Profit Level

The second input that I challenge is Rosston and Topper's calculation of Comcast's video profits. They chose to use Comcast profit levels that are much smaller than what are estimated by respected analysts.[21] Furthermore, there are wide regional variances, despite programming prices being very similar across Comcast regions. The profits they cite range from {{[redacted]}} in Philadelphia (Freedom region) to {{[redacted]}} in the Houston region.[22] In the absence of an explanation, it is hard to understand why there is such profit variation across markets. Is the Philadelphia market much more mature for Comcast than the Houston market? Without more, it is difficult to rely upon Rosston and Topper's profit data.

C. Other Analysis by Rosston and Topper

Rosston and Topper also performed a regression analysis, attempting to demonstrate that, after being acquired by Comcast, prices for NBCU programming grew slower than prices for other non-vertically integrated programming. To reach such a conclusion, they compared the growth affiliate fees of certain Comcast/NBCU networks with a select group of non-affiliated top 50 cable networks.[23] Rosston and Topper included six Comcast/NBCU networks in their analysis, and 18 non-vertically integrated networks whose growth rates were between [[[redacted]]] and

[21] I reviewed data from a respected Wall Street analyst that showed the estimated video gross profit dollars per subscriber for Charter and Comcast to be $37. The estimate for Time Warner Cable was $34.

[22] *See* Comcast Response to FCC Information and Data Request, Request 23.

[23] All the data about popularity and prices that Rosston and Topper used were sourced from SNL Kagan.

[[[redacted]]]. The problem with their sample is that the typical control network they selected was, on average, much more popular than the treatment, an NBCU network.

For example, the control included the sports networks, ESPN, ESPN2, and the NFL Network, whose growth has increased dramatically over the treatment period. In fact nine networks they selected, or half of the control sample, were more popular than the second most popular NBCU network. Since the control group has much more popular programming than non-control group, it is not surprising that Rosston and Topper conclude that an increase in overlap does not have a significant effect on price growth. The more popular programming deserves higher price increases as compared with less popular programming. The fact that they cannot make a conclusion given that more popular programming should have higher price growth signifies that increased overlap does increase price growth.

Rosston and Topper also presented evidence claiming that the actual rates of NBC O&O stations are lower today than the rates of other O&O stations that are not affiliated with an MVPD. To reach this conclusion, Rosston and Topper chose not to use a regression analysis for the NBC O&Os, due to data issues, but only used prices from 2010 and 2013. They conclude that the evidence "does not support a conclusion that the additional vertical overlap from the current transaction will lead to transaction-specific retransmission consent fee increases."[24] Their analysis has significant flaws, and the Commission should reject Rosston and Topper's conclusions.

The problem with their conclusion is that since 2010, the NBC O&Os have increased, both in absolute dollars and in percentage terms, faster after the Comcast-NBCU merger than the

[24] Rosston and Topper, at ¶ 125.

other big four national network-affiliated O&O stations. The prices for NBC O&Os in 2010 were $[[[redacted]]] and are now $[[[redacted]]]. The prices for Fox O&O, CBS O&O, and ABC O&O in 2010 were $[[[redacted]]], $[[[redacted]]], and $[[[redacted]]], respectively and are now $[[[redacted]]], $[[[redacted]]], and $[[[redacted]]].[25] Although Rosston and Topper acknowledge this, they dispute its relevance, claiming that this may have been an artifact of contract length or ownership structure of the other Big 4 O&O, but provide no evidence that justifies ignoring this contradictory finding from the evidence. Basically, they argue that NBC O&Os are still lower than the others, and that this should tell us the merger with TWC will produce no vertical harm. Rosston and Topper's arguments that prices for the NBC O&O's did not rise much faster than others O&O's after the Comcast/NBCU merger are not convincing.

Another problem with Rosston and Topper's data on retransmission fees is it was sourced from estimates developed by Kagan. Kagan does not have access to the programming agreements of the broadcasters, or the MVPDs, because these agreements are subject to nondisclosure requirements, barring their review by third parties, including industry analysts such as Kagan. It is inappropriate for the Commission to rely upon the findings of Rosston and Topper when the underlining "data" are in fact industry estimates.

Even assuming that industry estimates are accurate, there is an additional reason this data should not be used – it does not reflect an open market. One would presume the Fox O&O, CBS O&O, and ABC O&O fees reported by Kagan are based on the average price paid by all MVPDs in the markets, including Comcast. However, while all MVPDs in the market, including Comcast, negotiate with these broadcasters at arm's length, the same cannot be said with regard to the MVPDs that carry NBC O&Os, particularly Comcast. Since Comcast and the NBC O&Os

[25] Rosston and Topper, at ¶ 124, Table III. C.2.

are under common ownership, the negotiations between Comcast and the NBC O&Os cannot be considered arm's length. The amount Comcast actually pays to its NBC O&Os is more of an accounting entry, and does not reflect how much it might pay if the two entities were under separate ownership. Rosston and Topper do not account for this distortion in the results which fatally undermines the reliability of the results. A more accurate accounting would exclude the rate Comcast pays for its NBC O&Os, and exclude the amount that Comcast pays to Fox O&O, CBS O&O, and ABC O&O. Such a comparison would better reflect whether NBC O&Os sought higher prices from MVPDs due to its affiliation with Comcast than comparable broadcasters who are unaffiliated with an MVPD.

Moreover, the comparison between the prices for Fox, CBS, and ABC O&Os should only be conducted for the markets where all four networks have affiliates, and not in all O&O markets. This is because the broadcast networks negotiate with most MVPDs for more than just the local broadcast stations, but for national cable networks. Because the big four networks negotiate with MVPDs for a bundle of programming that includes their national cable networks as well as their O&O stations, it's hard to assess the exact fee paid for any one channel included in the entire deal. The allocation of fees among all the changes is more of an accounting exercise than a true assessment of what the MVPD may pay for the programming if it were a negotiation for just the broadcast station.

IV. OTHER ISSUES WITH ROSSTON AND TOPPER'S METHODOLOGY

Rosston and Topper claim the integration of video programming assets with MVPD assets eliminates double marginalization, and this is a benefit of the pending merger because it can be strongly pro-competitive. The Commission, in *Comcast-NBCU*, rejected this view, affirming that it did "not credit the Applicants' claims as to the cost savings they will achieve from the elimination of double marginalization, and the resulting effect on subscriber prices, because they are insufficiently substantiated and because they likely overstate the actual benefits to the firm and consumers."[26] Thus, the Commission has already determined that the double marginalization benefit claimed by Comcast in its last merger is small at best. There is no reason for the Commission to reach a different conclusion in the current proceeding.

In Biglaiser I, I identified a retail price effect which says that if Comcast raises its price to video subscribers and some of them leave for other MVPDs, then it will still make some profits from these lost subscribers by selling its programming to the other MVPDs. This effect will increase Comcast's incentive to raise its own subscription price, and is in addition to the increased opportunity cost effect previously identified with respect to the Comcast-NBCU merger. With this higher opportunity cost, Comcast will charge more for the programming to its subscribers, but will experience less loss in profit due to subscriber defections. Thus, not only are Comcast's rivals hurt by the increased market overlap between it and MVPD rivals, but Comcast's own subscribers are hurt.

Rosston and Topper claim that the retail price effect I identified is flawed because it looks only at Comcast's profit after the transaction and does not take into account the double marginalization effect.[27] Aside from the fact that the Commission has already indicated that the double marginalization effect will be very small, these objections to my analysis lack validity for several other reasons.

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[26] *Comcast NBCU, supra*, 26 FCC Rcd at 4247.

[27] *See* Rosston and Topper, at ¶ 184.

First, as I have previously demonstrated, post-merger Comcast would have an incentive and ability to charge a higher price to its own customers than if it did not sell programming to rivals. Second, when choosing its price for its subscribers, the prices for its programming to its rivals have typically already been determined, since the length of a programming contract is at least three years, and larger MVPDs often stagger the end date of their programming agreements. Since in any given year the majority of its programming expenses will not vary in the near term, it is reasonable to assume Comcast takes the costs for its programming as a given and maximizes its profit.[28]

Another aspect that should be included in the analysis is that along with choosing prices for its customers, Comcast also chooses the level of service quality. As it makes its rival MVPDs less competitive by charging higher prices for programming, Comcast not only has an incentive to raise its price, but also to lower its service quality level. This seems to fit well with the current reputation that Comcast has for poor customer service.[29] In economic terms, Comcast will choose its price and quality of service levels simultaneously, and due to both being super modular for Comcast's profits, it will raise prices and lower quality of service. As I stated above, the FCC did not think the reduction of the double marginalization effect would be very significant in the Comcast-NBCU merger and therefore the Commission should give it little or no weight in analyzing the benefits and harms of the Comcast-TWC merger.

[28] While I recognize that Comcast negotiates contracts with different MVPDs at different times, Comcast has the ability and flexibility to change its pricing, promotions, and quality of service in a DMA at any point during the term of an individual programming contract. That is, contracts for programming with MVPDs are longer lived decisions than other strategic variables that Comcast chooses.

[29] *See, e.g.,* http://bit.ly/1gI0rE9 and http://bit.ly/1DQDksq.

Rosston and Topper also claim that the bargaining model does not take into account transaction-related efficiencies and thus underestimate the opportunity cost of Comcast to sell its programming to rivals.[30] My previous analysis demonstrated how the alleged efficiencies of the merger will lead to higher profit per-subscriber for Comcast and result in a higher opportunity cost of selling programs to a rival MVPD. One could assume that both Comcast and its consumers somehow will share gains from the efficiencies. However, it is completely implausible to think that consumers will gain 100% of the benefit from the alleged efficiencies. This would only happen in a market of perfect competition with homogenous goods or a homogenous goods market with identical firms. No one could possibly think that this market satisfies these conditions. The efficiency effect does raise Comcast's opportunity cost of selling programming to rival MVPDs and is captured in the bargaining model.

Moreover, Rosston and Topper give the impression that I believe Comcast's customers will not gain a bit of surplus from the merger. My point, when I said increased efficiencies can have negative consequences for rival MVPD subscribers, was that rival MVPDs and their subscribers will be harmed by from the merger due to the higher opportunity cost of Comcast selling its programming. This is *not* a new aspect of the bargaining model, it is *part* of the model. When looking at this merger, ACA's point is that the quantifiable harms outweigh the benefits, and merger conditions should be structured so that rival MVPDs and their subscribers are not made worse off if the merger is approved. Rosston and Topper claim throughout their

[30] *See* Rosston and Topper, at ¶ 176.

filings that the market for MVPD subscribers is vibrant.[31] Even if that were so, it is important to keep the marketplace a competitive one.

V. HORIZONTAL CONCERNS

A. Sale of Programming

This transaction threatens two horizontal harms, as discussed in my earlier paper. One flowed from Comcast's combined ownership of the RSNs and the NBC O&Os in Los Angeles and New York. The other was the increased bargaining power that Comcast will have with programmers once the transaction is completed.

Rosston and Topper claim that since the RSNs in Los Angeles and New York are not close substitutes for NBC O&Os, putting these programs under the same ownership will not increase Comcast's bargaining power, relative to if they were owned separately.[32] As I stated in my earlier paper, the bargaining power effect of joint ownership of two "must have" programming assets does *not* depend on the networks being close substitutes.[33] It simply relies on the MVPD having a downward sloping demand function, which is not an unreasonable assumption and is one the Commission has accepted in recent proceedings. In *Comcast-NBCU*, the Commission found that programming networks do not have to be close substitutes for a joint

[31] *See, e.g.*, Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, (filed April 8, 2014) at Exh. 5 (Gregory Rosston and Michael Topper, "An Economic Analysis of the Proposed Comcast-Time Warner Cable Transaction," at ¶ 24.) *See* http://bit.ly/1qzzdFe .

[32] *See* Rosston and Topper, at ¶ 192.

[33] *See* Biglaiser I, at 26.

owner of two networks to be able to extract higher prices from MVPDs.[34] The Commission based its findings on the joint ownership of FOX O&O and RSNs.

B. Purchasing of Programming

Regarding the second horizontal harm, Rosston and Topper claim that no evidence was provided that Comcast-TWC would achieve a significant fee decrease in purchasing programming.[35] They again repeated the demand and supply analogy, which is clearly not an appropriate framework to use, given that there are a few firms with significant market power.

The fact that no evidence was provided to demonstrate that there would be a significant fee decrease for Comcast-TWC in the purchasing of programming is not dispositive because no MVPD has ever negotiated on behalf of more than 30 million subscribers. Thus, comparative evidence of the sort Rosston and Topper demand is simply not available. That said, it is well known that, in general, the larger the MVPD, the lower the programming price per subscriber. Merging Comcast and TWC, and allowing Comcast to bargain for BHN, will increase the merged company's number of buyers by over 10 million, and increase the number of subscribers that it is buying pre-merger by more than 50%.

The reduction in programming fees for larger MVPDs arises from two mechanisms. First, a bigger MVPD provides a programmer with higher advertising revenue because an advertiser need contract with only one MVPD to reach a large segment of the population. A second mechanism is increased bargaining power, because the profit level – disagreement point in bargaining theory – for a programmer falls significantly if the programmer is not distributed

[34] *See Comcast-NBCU*, *supra*, Appendix B at ¶ 55.

[35] Rosston and Topper, at ¶ 46.

on a large MVPD. The MVPD can take advantage of the threat of the programmer not being carried on its platform to obtain lower prices. Essentially, all participants in the programming market, except perhaps for those with ties to Comcast, think that the larger an MVPD, the better the prices it will typically obtain from programmers.[36]

Rosston and Topper also chose to completely ignore the competitive harms that result from the fact that Comcast likely will be a buying agent for BHN, replacing TWC in that role. As I wrote previously, if TWC currently did not think it was advantageous to be a buying agent for BHN, then they would not do it. As a result of Comcast's acquisition of TWC's interest in Time Warner Entertainment-Advance/Newhouse, Comcast will also find it advantageous and neither Comcast nor Rosston and Topper suggest otherwise.

Purchasing programming for BHN will increase Comcast's opportunity cost of selling programming to BHN's rival MVPDs, and Comcast will therefore have an incentive and ability to charge MVPDs higher prices in markets where these providers compete against BHN. BHN matters to Comcast's profits in two different ways. First, as a service provider to BHN post-merger, Comcast will have an incentive to take actions to make BHN more profitable because Comcast will be able to raise its price for its managed services, as its value to BHN increases. This effect arises from various bargaining models including the Nash Bargaining Solution.

Second, since BHN will [have the option of buying] its programming at the price that Comcast negotiates with programmers, the more subscribers that Comcast has to offer programmers the more bargaining power and hence lower price it can obtain. Even though BHN has the option of buying programming on its own, it is not credible to conclude that BHN would

[36] *See*, *e.g.*, Rosston and Topper, at n. 78.

walk away from the price that Comcast can negotiate, given Comcast's historic ability to obtain the lowest prices in the industry for programming.

When Comcast negotiates with programmers, programmers will realize that BHN will not negotiate with them separately, and failure to reach an agreement with Comcast will mean the loss of access to not only Comcast's customers, but also to BHN's customers. Therefore, the more customers served by BHN, the more bargaining power that Comcast will have in its negotiations. Given Comcast's interest in promoting BHN's success, Comcast will have an incentive and ability to charge higher prices to BHN's MVPD rivals to make them a less attractive alternative in the market.

I recognize that a customer of a rival MVPD going to BHN will have a different value to Comcast than one going to Comcast. Relatedly, I also acknowledge that getting a subscriber directly is more profitable for Comcast than a subscriber going to BHN. Nevertheless, while the profit is not as high for such a subscriber, it is still positive and it still raises the opportunity cost for Comcast to sell programming to BHN's rival MVPDs.

Rosston and Topper argue that there is no justification for the view that if Comcast obtains lower prices for programming, other MVPDs will pay higher prices.[37] Rosston and Topper argue that each party will always try to get the best price given the bargaining circumstances that it faces, and the Comcast/TWC will not impact negotiations between programmers and MVPDs that do not involve the merging parties. But, if the bargaining environment changes, then the best price these MVPDs can obtain also changes. Comcast getting larger, and thus increasing its bargaining power, is a change in the bargaining environment for both a programmer and a rival MVPD that cannot be dismissed.

[37] Rosston and Topper, at ¶ 46.

The economic reasoning of my earlier analysis was based on the idea of credible threat and commitment based on the analysis of Nobel Prize winner Thomas Shelling (1960) in his classic book, *The Strategy of Conflict*, describing how parties will take actions to prevent them from backing down in an encounter with a rival. In one example, Shelling explained that an army would destroy a bridge in order to make it impossible to retreat from a battle with a rival. A rival seeing this knows that it must engage with the party or retreat because there is no possibility for the rival army to retreat. In a similar vein, when programmers make profit commitments to Wall Street, they make it very difficult for themselves to back down from a bargaining position of high prices from an MVPD, and since Comcast can get better prices due to stronger bargaining position with a programmer, this puts a smaller MVPD in a particularly difficult bargaining position.

Furthermore, Rosston and Topper are wrong to claim that there is no formal model demonstrating that if one buyer obtains lower prices due to its increased bargaining power, then other rival firms will have to pay higher prices. The phenomenon is known in the economic literature as the "waterbed effect." Inderst and Valletti[38] demonstrate that it is possible that a firm with more market power -- in their model the firm competes in more markets -- will get lower prices as the firm gets larger and other firms competing with it will pay higher prices due to the growth of the larger firm. The idea is that as one firm becomes larger, then its outside option of rejecting a programmer's price and going to a substitute supplier becomes more attractive, since it can amortize the switching costs over more markets. Conversely, since the smaller firm will have fewer subscribers because of the favorable terms granted the larger firm, it

[38] Roman Inderst and Tommaso M. Valletti "Buying Power and the 'Waterbed Effect,'" *Journal of Industrial Economics* (2011), at pp. 1-20.

will have a worse outside option to amortize its switching cost to another supplier. This will result in higher wholesale (programming) prices for the smaller firm.

Inderst and Valletti further demonstrate in a Hotelling style model that if the difference in wholesale prices (programming prices) is already sufficiently large, then, by making the large firm even larger, aggregate consumer welfare can be lower due to the waterbed effect.

Now, there are differences in the stylized model they present and the programming market, but a suitably modified model of the programming market could be structured that will obtain the same effect. Thus, it is logically possible for smaller MVPDs to pay higher prices for programming due to Comcast receiving lower prices due to its increased bargaining power following the merger. This theoretical effect is consistent with the real-world evidence provided by Rich Fickle, the CEO for the NCTC, which negotiates programming contracts for most of the smaller MVPDs.[39]

Rosston and Topper go to great pains to claim that Comcast will not benefit in the purchasing of programming due its increased size after the transaction, stating:

> A content provider's sale of programming to both Comcast and TWC involves zero marginal cost, and programming is sold through individualized negotiations. In that case, Comcast and TWC cannot reduce programming fees post-transaction by reducing their purchases of programming and moving along the supply curve.[40]

The problem with their claim is two-fold. First, if true, then why don't all MVPDs pay the same price for programming? Are they saying that there is no relation between size of an MVPD and cost of programming if the marginal cost is zero for supplying another MVPD?

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[39] *See* ACA Comments, at Exh. B (Declaration of Rich Fickle) at ¶¶ 8-9.

[40] *See* Rosston and Topper, at ¶ 51.

Clearly, this is not the case. Second, while the short run incremental cost of supplying programming maybe close to zero, this is clearly not the case for long run programming costs, where the cost of new programming is substantial.

Rosston and Topper expend great effort claiming that by adding scale, Comcast will have a larger incentive to deploy innovative technologies because it will be able to spread out the fixed costs on a larger base of consumers. By this logic, if programmers think they will obtain lower future prices, then they will have a disincentive to invest in programming.

VI. CONCLUSION

To conclude, there are some fundamental problems with the data that Rosston and Topper used to compute the harms from the proposed Comcast/TWC/Charter transaction. These lead them to underestimate the potential harms from the transaction. The Commission should ignore the proposed inputs by Rosston and Topper and rely upon the data and information that is most credible. It should also dismiss Rosston and Topper's arguments suggesting that the Comcast/TWC/Charter transaction will not cause harm in the MVPD and video programming markets. The transaction will cause competitive harm, and the Commission needs to take steps to ensure that a vibrant, competitive marketplace will be in place after the transaction is consummated.